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**NATIONAL PROSECUTION AND TRANSITIONAL JUSTICE:
THE CASE OF ETHIOPIA**

A Dissertation Presented to the School of Law at the University of Warwick

In Fulfilment of the Requirements for the Degree of Doctor of Philosophy

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DEDICATION

TO ALL VICTIMS OF POLITICAL VIOLENCE

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LIST OF ACRONYMS

1. ALF – Afar Liberation Front
2. ANC – African National Congress
3. AWP – Afrikaner Weerstand Beweging or Afrikaner Resistance Movement
4. COEDF – Coalition of Ethiopian Democratic Forces
5. CONADEP – National Commission on the Disappeared (Argentina)
6. EDU – Ethiopian Democratic Union
7. EMALDH – Union of Ethiopian Marxist-Leninist Organizations
8. EPLF – Eritrean Peoples Liberation Front
9. EPRA – Ethiopian Peoples Revolutionary Army
10. EPRDF – Ethiopian Peoples Revolutionary Democratic Front
11. EPRP – Ethiopian Peoples Revolutionary Party
12. FDRE – Federal Democratic Republic of Ethiopia
13. ICC – International Criminal Court
14. ICCPR – International Covenant on Civil and Political Rights
15. IHL – International Humanitarian Law
16. Malerid – Marxist-Leninist Revolutionary Organisation
17. Me'ison – All Ethiopian Socialist Movement
18. OLF – Oromo Liberation Front
19. PAC – Pan-African Congress
20. PDRE – Peoples Democratic Republic of Ethiopia
21. PMAC – Provisional Military Administration Council
22. POMOA – Provisional Office for Mass Organization Affairs
23. PPG – Provisional People's Government
24. SLM – Sidama Liberation Movement
25. SPO – Special Prosecutions (Prosecutor's) Office
26. TGE – Transitional Government of Ethiopia
27. TPLF – Tigray Peoples Liberation Front
28. TRC – Truth and Reconciliation Commission (South Africa)
29. UDHR – Universal Declaration of Human Rights
30. UN – United Nations
31. Wezlig – Workers League

- 32. WPE – Workers Party of Ethiopia
- 33. WSLF – Western Somalia Liberation Front
- 34. WWI – the First World War
- 35. WWII – the Second World War

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PREFACE

Political rivalry, antagonism and violence of one form or another has been part of the political history of Ethiopia; a country that endured successive imperial and feudal regimes followed by a military junta called the Dergue – meaning Committee – during which violence took its extreme manifestations. Extreme political violence was the *modus operandi* of the military regime, and apparently, the 17 years of its rule can be characterized as the bloodiest regime, or at least one of such regimes in the country's history. The fall of the Dergue regime opened a window of opportunity for social and political transformation. Many viewed this event as marking the end of atrocities and the beginning of a new social and political order, essentially of the rule of law, democracy and human rights. In deed, certain transitional measures can be considered as crucial steps in the right direction. The 1991 transitional period Charter declared democracy as a categorical imperative and provided for the respect and protection of fundamental human rights enshrined in the Universal Declaration of Human Rights. Its Successor, The FDRE constitution, devotes one-third of its provisions to human rights and establishes the formal institutions of rule of law, human rights and democratic governance; thus exhibiting the basic features of a democratic, law-abiding and human rights respecting system. Within this broader setup, the Ethiopian transitional justice trials may be regarded as an effort to redress past violations while at the same time constitutive of a new political society.

I started to attend some of these trials as a reporter for the Trial Observation and Information Project (TOIP), launched to gather and document information relating to these trials. At the time, I was a law student at Addis Ababa University; and my duty was to prepare and submit a summary of court proceedings together with my reflections. These early day engagements and familiarity with the trials, I think, have an impact in guiding me to this interdisciplinary study of the Ethiopian transitional justice trials.

At the beginning of the proceedings, there was high expectation and enthusiasm both domestically and internationally about the constructive impacts of these trials. Because of the desire of too many people including diplomats and foreign journalists, prior registration and obtaining entry card was sometimes necessary to attend these trials, especially those involving top Dergue-WPE officials. However, as the trials dragged on, such expectation and

enthusiasm apparently declined and as our late Prime Minister Meles Zenawi reportedly noted “the exercise became more and more irrelevant”.¹ This is an acknowledgement that the delay of the proceedings was an obstacle to the achievement of the desired result(s). A more drastic of the views was that the process was a reflection of victor’s justice, partial and inappropriate to solving deep-rooted social and political problems in Ethiopia with some questioning the very motivation of the government. Despite these, after protracted court proceedings, a huge number of Dergue officials and their affiliates were found guilty and convicted. Most of the top officials of the Dergue – WPE, including those sentenced to death, were recently released. A fundamental issue worth discussing is whether these trials had successfully addressed the past and served as a foundation of a new order. Have we departed from a culture of political mistrust, antagonism, polarization and violence? Have we built proper and functioning institutions of the rule of law and of justice? Has human dignity and worth become part of our social and political reality? Many would agree that Ethiopia has shown a tremendous economic achievement over the recent past. Has parallel transformation occurred with respect to the rule of law, democracy and human rights? A common observation may reveal improvements compared to the Dergue regime. Nevertheless, such comparison with a demonic regime ignores the overall transformative impact of transitional justice processes, leading to a new social and political identity. Thus, it is necessary to ask what do the trials mean for the Ethiopian public in terms of justice, truth (of knowing what happened and why), the rule of law, democracy, human rights, accommodation and tolerance in addressing political and other differences? This study is therefore a fraction of the broader intellectual endeavour of looking at the social, political and legal impact of these trials based on qualitative empirical research. By showing the complex and contested nature of transitional justice processes in Ethiopia, it calls for further research and intellectual debate in to how we, in Ethiopia, have dealt with our past, its success and challenges as well as what should be done to complement the process.

¹ Interview by Kjetil Tronvoll with Prime Minister Meles Zenawi, 16 January 2002, in K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.).2009. *The Ethiopian Red Terror Trials: Transitional Justice Challenged (African Issues)*, James Currey, at 69.

ABSTRACT

This dissertation is concerned with how societies in transition respond to past violation by focusing on how Ethiopia has dealt with gross violations committed during the repressive regime of a military junta called the Dergue – meaning Committee. It is widely believed that transitional justice processes play a significant transformative role in societies in transition. Based on a case study of the process and impact of prosecution of Dergue officials and their affiliates, this dissertation demonstrates that transitional criminal justice processes may not necessarily transform a society to a new social and political identity that essentially departs from a repressive past. The study discusses and analyzes the theory of transitional justice emphasizing the discourses on the meaning and significance of the main components of transitional justice – justice, truth, reparation and reconciliation – and relates these discourses to the Ethiopian experience. The study is qualitative, employing both primary data (primarily in-depth interview), and secondary data including literature (on Ethiopian history, law and politics), laws both national and international, court cases, and various reports including those of courts and the prosecution office. In the Ethiopian context, the arguments in support of prosecution resonate with the general theoretical arguments that it is necessary to render justice, establish rule of law, ensure accountability, serve as deterrence, and generally serve as a foundation for a new political and social identity. However, whether prosecution or prosecution alone was an appropriate response in the Ethiopian context is a contested issue. Secondly, the legal framework for prosecution and its implementation are also problematic. Thus, this study shows the problematic nature of transitional justice processes as carried out in Ethiopian social and political context in terms of both bringing closure to the past and playing a transformative role, and thereby showing the complex and contested nature of transitional justice itself.

CHAPTER ONE: INTRODUCTION

1.1 Background to the Study and Overview of State and Society in Ethiopia

Ethiopia is an East African country inhabited by diverse linguistic, religious and cultural groups with a long history of existence and civilization - the pre-Axumite civilization and Axumite civilization, and afterwards. It is considered as a cradle of humankind with the discovery of Lucy, otherwise known as Dinknesh in Amharic, meaning miracle or marvellous. Ethiopia is also the only African country never to have been formally colonized, and hence a symbol of independence and freedom. One may remember the Battle of Adwa where Ethiopia defeated Italy and sent a message to the rest European colonizers. This is a victory of the people of Ethiopia. So the story goes.

There is also a different history. A dark side of history is that Ethiopian people endured centuries of oppression by their own rulers or leaders. The country and its people were ruled for a long period by Imperial regimes most of whom claimed legitimacy based on descent from King Solomon of Israel and Queen Sheba who gave birth to the first Ethiopian King - King Menelik I.² The population suffered under successive imperial regimes, which had absolute power. The last Emperor of Ethiopia, King Haileselassie, cemented its absolute power with the adoption of the first written constitution in 1931, and the country and its people were under his control.³ The then existing oppressions gave rise to popular uprisings in mid 20th Century against the imperial regime – including peasant revolts in Tigray, Gojjam and Bale.⁴ Student movements and other revolutionary sections of the society including the

² This descent from King Solomon is enshrined in a text called Kebra Nagast, which means Glory of Kings. See, BUDGE, E.A. (trans.). 2000. *The Queen of Sheba and Her Only Son Menyelek (Kebra Negast)*. Ontario: Cambridge. [Accessed on 6 June 2013]. Available from World Wide Web: <http://www.yorku.ca/inpar/kebra_budge.pdf>. In its preface Budge noted that this document “has been held in peculiar honour in Abyssinia for several centuries, and throughout that country it has been, and still is, venerated by the people as containing the final proof of their descent from the Hebrew Patriarchs, and the kinship of their kings of the solomonic line with Christ, the son of God.” The claim of legitimacy by Ethiopian kings based on solomonic descent and Christianity can also be noted from Zenebe Bashaw – see ZENEBE BASHAW. 2008. *Governing the Public Sphere and State Formation in Ethiopia*. Yaundi: Nagoya University. [Accessed on 10 June 2013]. Available from World Wide Web: <http://www.cadesria.org/IMG/pdf/Zeneb_Bashaw.pdf>, at 13

³ BASHAW, Z., Above n 1 at 10. See also BAHIRU ZEWEDE. 1991. *A History of Modern Ethiopia, 1855-1991*. Oxford: James Curray, at 201. Bahiru noted that the King “came to be regarded as a permanent factor, as immutable as the mountains and the rivers of the country”.Pg.201

⁴ BASHAW, Z., Above n 1 at 13

military had also been questioning the legitimacy of the imperial regime and calling for reform or change.⁵ Eventually, the last feudal regime of Emperor Haile-Sillassie ended through a coup in 1974 led by a military junta called the “Dergue”- meaning Committee.

The Dergue, under the leadership of Col. Mengistu Haile-Mariam, instituted a military regime that ruled the country based on an asserted socialist ideology until 1991.⁶ The seventeen years of the Dergue regime witnessed gross violation of human rights. Immediately upon gaining power, the Dergue commenced a period of violence with summary executions of about sixty high officials of the imperial regime and the secret killing of the Emperor and the Patriarch of the Ethiopian Orthodox Church.⁷

As the Dergue took power, several political groups opposed it, and as a result, in 1976, the Dergue launched what was called the Red Terror Campaign to eliminate opposition political groups characterized as “counter revolutionaries”. This campaign took place for two years until 1978, resulting in killings, detention, torture and disappearances.⁸ According to one account, “thousands of people turned up dead in the streets of the capital and other cities in the following two years [meaning 1976-1978]”⁹. Although the Dergue was the main violator, some sources indicate that opposition political groups also resorted to violence.¹⁰ Apart from, or in addition to, the Red Terror campaign, other conditions had worsened the context of violations and human suffering.¹¹

⁵ BASHAW, Z, Above n 2 at 13

⁶ BAHRU ZEWDE. 2002. *A History of Modern Ethiopia, 1855-1991*. 2nd edition. Oxford: James Currey. P. 229. See also TRONVOLL, K. 2009. A Quest for Justice or the Formation of Political Legitimacy? The Political Anatomy of the Red Terror Trials. In: K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 1

⁷ ZEWDE, B, Above n 6 at 238. See also *Human Rights Watch: Ethiopian Dictator Mengistu Hailemariam*. 1991. [online]. [accessed on 14 Nov.2008]. Available from World Wide Web: <<http://hrw.org/english/docs/1991/29/ethiop5495.htm>>.

⁸ ZEWDE, B, Above n 6. See also DE WAL, A. September 1991. *Evil Days: 30 Years of War and Famine in Ethiopia (An African Watch Report)*. New York: Human Rights Watch. ; TRONVOLL, K.. Above n 5 at 1

⁹ *Human Rights Watch: Ethiopian Dictator Mengistu Hailemariam*. 1991. [online]. [Accessed on 14 Nov.2008]. Available from World Wide Web: <<http://hrw.org/english/docs/1991/29/ethiop5495.htm>>

¹⁰ see BAHRU ZEWDE. 2009. The History of the Red Terror: Contexts and Consequences. In : K. TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 25. see also TAFESSE OLIKA. *The Red Terror: Contextualizing Political Violence and Human Rights Abuse in Ethiopia During the Derg Regime*. Unpublished. (copy on file with author), at 13. These sources indicate that the EPRP had waged what was then called the White Terror.

¹¹ These conditions include civil war, the 1984 famine, the resettlement program, and the villagization campaign. For a detailed discussion on these contexts of violation see DE WAL, A. Above n 7. See also MATSUOKA, A. and SORENSON, J. 2001. *Ghosts & Shadows: Construction of Identity and Community in an African Diaspora*. Toronto: University of Toronto.

The overthrow of the dictatorial military regime in May 1991 opened a window of transition towards the rule of law, democracy and a rights-respecting system. In July 1991, a national conference of political parties, held in Addis Ababa, adopted a Charter for the Transitional Period and the Transitional Government of Ethiopia (TGE), composed of different political groups. At this point of transition, the question of dealing with past violations became crucial, and the TGE started to prepare to prosecute human rights violators during the Dergue regime.¹²

In 1992, the TGE issued a law establishing a Special Prosecutor's Office (SPO) with a mandate to conduct investigations and prosecutions against former Dergue officials as well as members of the military and security forces and their "auxiliaries".¹³ The main transitional process of dealing with the past was therefore criminal prosecution before national courts, with the SPO playing a crucial role. The stated objectives of the Proclamation were bringing perpetrators to trial, recording of the history of past violation (establishing the truth) as well as educating the public and making them aware of the past and thereby preventing its recurrence.¹⁴ In 1997, the SPO charged 5,198 people, of whom 2,246 were already in detention, while 2,952 were charged in absentia (including the Dergue leader, Col. Mengistu Haile-Mariam).¹⁵ After a prolonged court proceeding, the trial process was concluded. A document issued by the Special Prosecutors office, after the end of the trial process, provides detailed figures on the number of victims, witnesses and documentary evidence, suspects prosecuted, convicted or otherwise acquitted;¹⁶ of 16, 496 alleged victims, 12, 733 was established in court; 16, 107 witnesses were documented, of which 8047 testified before courts. The SPO submitted 15,214 pieces of documentary evidence; among the suspects, 5119 were prosecuted and tried (some in absentia), of which 3583 were convicted and penalized while 1539 were acquitted. We note, from these figures, the scale of the process of administering justice during the transition. With the conclusion of the prosecution and trial process, however, there is a need to interrogate whether the transitional process of accountability has achieved its objectives.

¹² TRONVOLL, K., Above n 6

¹³ *Proclamation for the establishment of the Office of Special Prosecutor*, 1992: Proclamation No. 22/1992, Federal Nagarit Gazette, 1st Year, No.18, August 8/1992. See Article 6 of the proclamation regarding SPO's mandate.

¹⁴ See Paragraph 5 of the Proclamation No.18/1992(Ibid).

¹⁵ *Human Rights Watch*, Above n 8

¹⁶ see SPO Report. (January 2002 E.C). *Dem Yazele Dose* (Amharic word approximately to mean "A file containing blood"). Addis Ababa: SPO. Chart number III. One may note that 16 496 were alleged victims of which 12 733 was established at court.

It has been contended that how a society decides to deal with its past has a major determining influence on whether that society will achieve long-term peace and stability¹⁷ as well as whether that society transforms into a democratic and rights-respecting polity. Thus, societies in transition need to make a careful decision in responding to past abuses. In this connection, Louis Joinet, Special Rapporteur for the Commission on Human Rights, formulated a ‘right to know,’ a “right to justice,” and a “right to reparations” for victims and interpreted these rights as requiring states to adopt a variety of measures in order to expose the truth, combat impunity and guarantee the non-recurrence of violations.¹⁸ As will be shown, the right to know and the right to justice belong not only to victims and their relatives but also to the public. Reparation, which may form part of the right to justice, is a crucial component of a transitional process. In addition to these tripartite rights, a society has also to provide for a process of reconciliation. According to Sarkin, transitional mechanisms of dealing with past abuses should consider three essential goals: truth, justice and reconciliation,¹⁹ and this offer reconciliation as an additional element. These essential components of transitional justice - truth, justice, reparation, and reconciliation - form the basis of a theoretical framework for the discussion and analysis of the Ethiopian transitional process, as carried out in this present study. This study views these components as interrelated elements of transitional justice and stresses the need for comprehensive or holistic mechanisms in dealing with past violations.

1.2 Statement of the Problem

The Ethiopian transitional justice trials were undeniably landmark cases of dealing with former repressive regimes in the country's long history of political existence. Nevertheless, the transitional process of accountability adopted in Ethiopia was problematic for various reasons. A brief summary of these problems can be stated as follows. First, the articulation of the history of violations is problematic because there are alternative narrations of history that not only the Dergue but also other actors committed human rights violations. The second problem is that the process did not bring to justice all persons involved in past abuses. The

¹⁷SARKIN, J. 2000. *Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's approach in the New Millennium of Using Community-based Gacaca Tribunals to Deal with the past.* *International Law Forum*, p, 112

¹⁸OLSON, LM. JUNE 2006. Provoking the Dragon on the Patio, Matters of Transitional Justice: Penal Repression Vs. Amnesties. *International Review of the Red Cross*, **88** (862) , p, 282

¹⁹SARKIN, J, Above n 17 at 115. The theoretical discussions provide a detailed discussion as to the relationship between these elements.

criminal investigation and prosecution was directed against persons who committed violations by abusing “their position” in Dergue or affiliated organizations. Therefore, it did not cover all violations and all perpetrators. Whether such selective prosecution is justified and the extent to which it has satisfied the need for justice is questionable. Thirdly, whether prosecution reveals the truth (the whole truth) is equally questionable. This is so particularly in light of the exclusion of some groups from the process of the transition and the non-existence of complementary mechanism to uncover the truth regarding the participation of those who were not prosecuted. Fourthly, the Ethiopian approach of emphasizing the punishment of perpetrators did not adequately address the demand for reparations. Fifthly, the Ethiopian approach ignored the need for reconciliation, which it has been argued, is crucial for the future of a society.²⁰ There are still some sections of society, particularly opposition parties and the private media, calling for a comprehensive national reconciliation process as part of a solution to the numerous problems of the country. These problems raise the question whether the Ethiopian transitional justice process has effectively addressed the past and played a transformative role.

1.3 The Thesis and Significance

In light of the complex context of massive violations of human rights, the transitional process of accountability adopted in Ethiopia lacks comprehensiveness in articulating the history of violations and in formulating a policy and mechanism for rendering justice, uncovering the truth, and providing reparation while entirely excluding reconciliation. The present study undertakes a comprehensive doctrinal and empirical analysis of the model of transitional justice adopted in Ethiopia. By examining the focus and process of the criminal prosecution, it asserts that truth, justice and reconciliation require something more than selective prosecution. The criminal prosecution process has not transformed the society into a new social and political system. This study, by showing the strengths and weaknesses in the Ethiopian transitional justice process, aims at strengthening public discourse and initiate further research into how we in Ethiopia have dealt with our past.

²⁰ MOBBEK, E. Transitional Justice in Post Conflict Societies – Approaches to Reconciliation. [Online]. Available from World Wide Web : < http://www.bmlv.pv.at/pdf_pool/publikationen/10_wg12_psm-100.pdf>, at 262. He, for example, argues, “reconciliation is the ultimate objective in all post-conflict societies and post-conflict reconstruction process”.

1.4 Research Issues

This study examines whether the approach adopted in Ethiopia has been comprehensive enough or otherwise in uncovering the truth, rendering justice, providing reparation and promoting reconciliation, considered as fundamental elements of a transitional process. It investigates the Ethiopian transitional process of accountability in light of these elements. Thus, the study examines historical, legal and political issues related to transitional justice in general and the model adopted in Ethiopia in particular.

The study addresses the following main questions.

- (a) What is the meaning and purpose of transitional justice?
- (b) What model of 'transitional justice' did Ethiopia adopt and why?
- (c) How was the history of violation articulated during the transition in Ethiopia? Was this problematic?
- (d) What is the connection between criminal prosecution and justice? Was justice done in the Ethiopian transition?
- (e) Is criminal prosecution compatible with the search for truth? Was the truth about the past established?
- (f) Is criminal prosecution compatible with reconciliation; was there any other process of reconciliation envisaged or initiated by the transition?
- (g) Was there a policy of reparations?
- (h) How does the Ethiopian model relate to the notion of transitional justice?

1.5 The Theoretical Framework

The concept of transitional justice and the diverse mechanisms of dealing with past violation are employed for the purposes of examining the Ethiopian model. The theoretical framework encompasses theories of justice, truth, reparation and reconciliation.

1.6 Methodology and Method

This study adopts a contextual methodology by focusing on legal, historical and political aspects determining the transitional process of accountability in Ethiopia, using a combination of methods. I analyze relevant literature on human rights and humanitarian issues, justice, truth, reconciliation, reparation and transitional justice. I engage in an analytical study of relevant national and international laws. I critically examine the transitional justice models adopted in other countries, for example in South Africa, for the purposes of comparison. I also rely on extensive interviews with people of different background in Addis Ababa and Mekelle, among the places where most of the prosecutions were conducted.²¹ Interview is an appropriate method of data collection for this study as it uncovers people's experiences, perspectives and textual descriptions about transitional justice processes in Ethiopian. Interviewees are selected from various sections of the society including victims/ relatives, suspects/perpetrators, politicians (government and opposition), judges, human rights activists, lawyers, and the public. Forty people participated in the interview, with their prior written consent although almost all of them request to remain anonymous. Both purposive sampling and snowball sampling has been e used to select interviewees other than the general public, in respect of which random sampling has been employed. The respondents were given the code R followed by a number to keep their anonymity. Such representation while protecting confidentiality allows the reader to trace the a respondents views on the various issues of the transition. This author believes the subjects interviewed do provide an adequate representation of the society, as the overlapping nature of the responses suggest the reaching of saturation point, whereby an additional interview could not evoke significantly new responses. Most of these interviews were audio recorded, later transcribed and translated by the researcher.²² The responses of each respondent are closely

²¹ Interview questions were prepared, and then approved by my supervisor. In view of the time constraint, these interview questions were sent to the interviewees to make them aware of the issues ahead of time and facilitate the interview process. Addis Ababa was chosen because it is a place where most top officials of the Dergue were tried. Mekelle is among the regional sate capitals where trials have been conducted and it is convenient for the researcher to consider it as the researcher works in Mekelle.

²²Cassette recordings are in possession of the author and can be submitted whenever required. Where audio records were not made, the author has to jot down the most relevant part of the responses. A summary of these responses is also with the author. The interviews were conducted in Amharic, the Federal Language of Ethiopia, and hence all translations are mine. However, the interviews with anonymous respondents R1 and R11 as well as the second round of interview with R2 were conducted in English, and thus the author has directly quoted them.

considered, and connections between different responses were analyzed to identify areas of convergence and divergence in light of specific components of the research questions. The categorization of the responses followed a closer examination and interpretation of all the responses, and such categorization is necessary for a logical analysis of the impact of transitional trial processes in Ethiopia. This study also benefited from consulting official documents including government reports, court proceedings and decisions available in Addis Ababa and Mekelle.

1.7 Impediments to the Research

Limitation of resources has been the main constraint to this research. The first in this respect is access to official documents, as many government offices are not entirely cooperative. The second is there are very limited relevant books and journals at home library, which meant that I had to rely on electronically available materials. However, access to the internet is a chronic problem. The third and perhaps the most serious constraint was the lack of research funding, particularly in light of the geographical location where I live, Mekelle, and its distance from the capital, Addis Ababa, where most sources of information are found. Finally, it was very difficult to get the consent of people for an interview. Many people were not willing to talk about the past for various reasons. Some were simply afraid, considering it as a politically sensitive issue. This however may suggest social and political transformation is far from reality. Others claimed the lack of time. Even when consent was secured, some were not willing to be recorded, which resulted in the noting of essential points with a possibility that other points were missed. In addition, in most cases, the interview duration was too short (less than 45 minutes) in light of the broadness of the questions for discussion. These are apparently significant constraints. Nevertheless, the existence of overlapping views across the different sections of the society and the reaching of saturation point, as indicated earlier, shows there is adequate empirical data to consider the general impact of the Ethiopian transitional justice process.

1.8 Structure of the study

This dissertation contains seven chapters, including this introductory chapter, which outlines the background of the study, statement of problem, significance of the study, and methodology as well as the research impediments. Chapter 2 interrogates the narration of

human rights violation in the Ethiopian transition. This chapter demonstrates that the transition's (official) narration of the history of violation is problematic as it excludes other narrations of history. It begins by offering some background to the Ethiopian transition. Then, it asks how the transition presents the history of violation. The third section presents other narrations of history that contest the official version and considers the implications of such a selective historical narrative on the transitional process.

The next two chapters offer a theoretical discussion of transitional justice. The third chapter provides a discussion on transitional justice in general. It addresses the meaning and history of transitional justice. It briefly discusses how some societies have responded to past violations and examines some general issues of transitional justice with a view to identify the crucial points that are relevant to the examination of the Ethiopian transitional justice process. The fourth chapter builds on the theoretical discussions in chapter three by closely examining the main components of transitional justice, which are considered as the foundations of a new post-transitional social and political system. It thus presents and analyzes the controversies surrounding the meaning, significance, and mechanisms of achieving these main aspects of transitional justice by focusing on justice, truth, reparation and reconciliation. Considering the significance of these components, this chapter provides an overview of the place of these components in Ethiopian transition. These theoretical discussions in chapters 3 and 4 offer the key elements for the analysis of the Ethiopian transitional justice processes.

Chapters five and six then present a critical examination of the Ethiopian transitional justice process. These chapters involve a critical examination of relevant laws, court cases, official documents, and primary data collected through in-depth interviews. Chapter 5 investigates whether the conceptions of justice adopted in the Ethiopian transition and the mechanism devised is appropriate to deal with Ethiopia's past. The investigation relates to both the framework and the outcome of the transitional justice process. Chapter 6 deals with the place of truth in the Ethiopian transition, asking whether the truth has been established, and the implications that follow. This chapter also investigates, whether the process has contributed to the achievement of other goals foreseen by the transition or otherwise thought to be desirable including the rule of law, democracy, respect for human rights, and reconciliation. The analytical chapters (chapter 5 and 6) demonstrate the controversies surrounding the legal framework, the implementation and the output of the Ethiopian transitional justice process,

and question the effectiveness of criminal prosecution in transforming Ethiopian society into a new social and political identity.

The last concluding chapter provides a summary of the discussion presented in the thesis.

CHAPTER TWO: INTERROGATING THE HISTORY OF VIOLENCE AND HUMAN RIGHTS VIOLATIONS

2.1 Introduction

The understanding and analysis of a society's response to past violations requires a consideration of how that society has formulated or articulated its past. In other words, the remembering and the articulation of the history of violation is an essential element of a transitional process of accountability because the manner of articulation greatly determines the responses thereto. As such this chapter discusses the significance of history, analyzes how the history of violation was articulated during the transition in Ethiopia, and considers whether such articulation was comprehensive enough – in other words, whether there were other constructions of history that dispute the articulation and presentation by the official transition process. These interrogations are important (1) to understand and analyze whether the transition had properly articulated the history of human rights violations and (2) to serve as a background for the other issues addressed subsequently in this study.

This chapter has four sections. The first briefly discusses the significance of history to transitional processes. The second provides the background to the Ethiopian transition. Section 3 analyzes how past violations were articulated and presented during the transition. The final section discusses alternative constructions of history as a challenge to the articulation by the transition. In this chapter, the author argues that the transition's articulation of past violations is problematic because it has adopted a narrow interpretation of violations during the Dergue regime by limiting them to violations committed by the Dergue itself and by excluding, or at least remaining silent about, the violations committed by opposing political groups. Thus, the main transitional justice process, i.e., criminal prosecution, focuses on such a narrowly construed narrative of past violation.

2.2 Why History?

We might say how a society decides to deal with its past has a major determining influence on its future.²³ This implies that the proper construction of history is an essential element in responding to past violations. This is because a transitional process is meant to address what went wrong in the past which if left unaddressed limit a society's transition to a better future. We might say that history is woven into daily life, yet even there it is complex and contested.²⁴ Professor Jardonova asserts that the 'the past shapes lives in complex ways'.²⁵ It does so at individual, family, community and national level. History offers people the opportunity to know and learn from the past. Our past partly determines our decisions and actions. Thus, apart from personal stories, collective memory and history at community and national levels play a crucial role in determining collective decisions and actions.

However, whether members of a certain group can have the same understanding of what happened in the past is controversial. It is argued that "there is frequently little consensus even among family members on the key stories and their interpretation, and there may not be a shared account about the nature and time of key events."²⁶ The argument goes on that just as in families, so in large groups, there can be little consensus on major events, their meanings and any actions they might imply.²⁷ These arguments suggest the difficulty of having a shared interpretation and presentation of the past at community or national level. This may result not simply from ignorance and subjective experiences but also because different interest groups may influence the interpretation of historical data and thus the construction of the past.

Nevertheless, both the public (members of the society) and policy makers need to develop a more informed understanding of the past.²⁸ David Crabtree argues that our view of history shapes the way we view the present, and therefore it dictates what answers we offer for

²³ See SARKIN, J. 2000. Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's approach in the New Millennium of Using Community-based Gacaca Tribunals to Deal with the past. *International Law Forum*. p.112

²⁴ JARDONOVA, L. 2008. How History matters Now, History and Policy Website [online]. [Accesses on 5 April 2010]. Available from World Wide Web: < <http://www.historyandpolicy.org/papers/policy-paper-80.html>>

²⁵ JARDONOVA, L, Above n 24

²⁶ JARDONOVA, L, Above n 24

²⁷ JARDONOVA, L, Above n 24

²⁸ JARDONOVA, L, Above n 24

existing problems.²⁹ Thus, a proper understanding of the past is a relevant issue to societies in transition including Ethiopia.

The above arguments are more relevant and apply more critically to societies that have experienced violence and gross violations of human rights under authoritarian repressive regimes and in contexts of civil war. When societies emerge out of such experiences, the construction of what happened in the past, at least in its broadest sense, is an essential tool in determining policies, decisions and actions that follow. Our view of past violence has an effect on how we deal with it and thus affects the transitional process. Thus, it has a significant impact on the truth-telling process, justice, reparations and reconciliation processes.

In transitional societies, there may not be a consensus about the reasons behind past violations, the perpetrators, the victims, the nature and extent of such violations. Individual experiences and emotions coupled with myth provide various presentations of what happened. The struggle for ‘history’ itself, and to articulate a public record of memories, may be understood as a critical aspect of transition. Therefore, in dealing with the past, a society should come up with the broadest construction that accommodates the various accounts of past violations and subject it to the transitional process of truth telling, justice, reparation and reconciliation. Thus, the next sections are devoted to the analysis of the construction of past violation during the Ethiopian transition.

2.3 Background to the Transition

Before analyzing how the history of violation was articulated, it is important to provide some general background on the Ethiopian transition. The popular revolution of 1960th ended the last feudal regime of Emperor Haile-Sillasie, giving a military junta, called the Dergue, an opportunity to assume state power, which established the Provisional Military Administration Council (PMAC) otherwise known as the Dergue. In 1984, with the adoption of a new constitution, the State was given the name the Peoples Democratic Revolution of Ethiopia (PDRE) and the Dergue continued to rule in the name of Workers Party of Ethiopia (WPE) -

²⁹ CRABTREE, D. NOV.1993. The Importance of History at the Website of Mckenzie Study Center, Institute of Gutenberg College [online]. [Accessed on 5 April 2010]. Available from the World Wide Web:<<http://msc.gutenberg.edu/2001/02/the-importance-of-history/>> He further argues “if we refuse to listen to history, we will find ourselves fabricating a past that reinforces our understanding of current problems.”

‘an authoritarian and state-sponsored party’. Despite the change in nomenclature, the military regime, under the leadership of Mengistu Haile Mariam, ruled the country along a proclaimed socialist ideology for 17 years (1974-1991).³⁰

During this period, the country witnessed one of the worst forms of a repressive regime. The regime faced strong opposition and resistance from various political groups as well as the population. Apart from the civilian opposition and resistance, there were armed opposition against the Dergue that gave rise to a long period of internal armed conflict.

A few general points about these political groups³¹ may be useful for an understanding of the central ideas in this and following sections. The first is that while most of these groups like TPLF and OLF were organized along ethnic lines, some of them like the EPRP were broad-based ‘national’ groups in the sense that they were not organized along ethnic lines. This emanates from a difference on the characterization of the nature of oppression in Ethiopia – the national v class oppression. Secondly, while some of these groups or movements like Me’ison and EPRP were civilian, at least initially, others like the TPLF took up arms right from the beginning. Thirdly, most of these groups had their origin in the student movements that played a crucial role in ending the imperial regime. They also had differences in political thinking and strategic differences that persisted from their student movement days. Finally, most of the political groups described themselves as Marxists. However, the EDU is different in this respect for it wanted to re-establish a monarchical system and thereby protect their interests. Despite the differences in their political goals and strategies, they all opposed the military regime except in situations where temporary and strategic alliances and shifts were made by some.³²

³⁰ For more details see TRONVOLL, K. 2009. A Quest for Justice or the Formation of Political Legitimacy? The Political Anatomy of the Red Terror Trials. In: K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey; BAHRU ZEWEDE. 2002. *A History of Modern Ethiopia, 1855-1991*. 2nd edition. Oxford: James Currey; DE WAL, A. September 1991. *Evil Days: 30 Years of War and Famine in Ethiopia (An African Watch Report)*. New York: Human Rights Watch. [Accessed on-----]. Available from World Wide Web: <http://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf>

³¹ see KISSI, E. 2006. *Revolution and Genocide in Ethiopia and Cambodia*. Lexington Books, p, 82. The principal political groups that opposed the Mengistu regime include the Eritrean Peoples Revolutionary Front (EPLF), the Ethiopian Peoples Revolutionary Party (EPRP), the Tigray Peoples Liberation Front (TPLF), the Oromo Peoples Liberation Front (OLF), the Ethiopian Democratic Union (EDU), the Afar Liberation Front (ALF), the Western Somalia Liberation Front (WSLF), the All Ethiopian Socialist Movement (Me’ison), and the Sidama Liberation Movement. Pg. 82. The coalition of TPLF and other armed groups, at a later stage, gave birth to The Ethiopian People’s Revolutionary Democratic Front (EPRDF).

³² The strategic alliance between Me’ison and Dergue against the EPRP might be one example. See TAFESSE OLIKA. *The Red Terror: Contextualizing Political Violence and Human Rights Abuse in Ethiopia During the*

The Dergue regime ended in 1991 because of armed struggle by a coalition of the armed opposition groups, mainly TPLF-EPRDF. Immediately before TPLF-EPRDF captured Addis Ababa, Col. Mengistu, on 21 May 1991 left the country first for Nairobi and then for Harare. The fall of the Dergue regime led to an era of transition towards democracy and respect for human rights through the establishment of the Transitional Government of Ethiopia (TGE) under the Charter for the Transitional Period.³³ The Charter underlined that the overthrow of the military dictatorship has presented the Ethiopian people with an opportunity to rebuild the country and restructure the state democratically, and that the demise of the Dergue marks the end of an era of subjugation and oppression and the beginning of a new chapter in Ethiopian history.³⁴ It also provided for the dismantling of institutions of repression installed by the previous regime, and underlined the proclamation of a democratic order as a categorical imperative.³⁵ Marking a departure from the culture of violence, the Charter incorporated human rights as an essential basis of the new government and provided for their respect and protection. The Charter also recognized the rights of people to self-determination. These rights and other fundamental principles are, latter, incorporated in the 1994 Constitution, which formally bears all the features of a democratic system, and were apparently very progressive developments.

It is worth noting here the process of the adoption of the Transitional Charter. The EPRDF organized “a conference of most of the Ethiopian factions, to discuss the formation of a transitional government.”³⁶ The Charter was adopted at the 1991 July Conference in Addis

Dergue Regime. [Unpublished]. (Copy on file with author). Although the EPRP and Me’ison had originally similar hostility against the Dergue, there emerged a difference on the political role of the Dergue in their goal to seize power. Taffesse argues while Me’ison wanted to seize power by using the apparatus of the state from within, the EPRP wanted to capture power by toppling the regime militarily from out side. It is indicated that the EPRP condemned the Dergue as “fascist” and called for its immediate removal and formation of a “Provisional People’s Government” (PPG)), while Me’ison believed that the Dergue had progressive sides to be exploited during the transitional period and offered it a qualified support and eventually decided to work with it. It is also suggested that they did not have social or ideological difference but one of strategy on how to seize power, as a result of which they became antagonistic and irreconcilable groups).

³³ *Transitional Period Charter of Ethiopia*. 22nd July 1991. Negarit Gazet, No.1.

³⁴ See *Transitional Period Charter of Ethiopia* , Above n 33, paragraphs 2 and 3 of the Charter. Paragraph 3 refers to the need to end hostilities, the healing of wounds, and the establishment and maintenance of good neighbourliness and cooperation.

³⁵ *Transitional Period Charter of Ethiopia*, Above n 33. paragraphs 4 and 5. Apart from the dismantlement of institutions of repression, the Charter does not provide for transitional processes of accountability.

³⁶ Human Rights Watch/Africa. December 1994. *Ethiopia: Reckoning Under the Law*. 6 (11) [online]. [Accessed on 13 September 2011]. Available from World Wide Web:< <http://www.hrw.org/reports/pdfs/e/ethiopia/ethiopia94d.pdf>>, at 11. See also ALEMANTE, G. SELASSIE. [year-unable to determine]. *Ethiopia: Problems and Prospects for Democracy*. William and Mary Bill of Rights

Ababa, which was meant to establish a legitimate, broad-based transitional government that could prepare the country for a smooth democratic transformation as agreed at the American-brokered London Peace Conference.³⁷ Various political groups participated in the Conference through their representatives.³⁸ The Charter provided that “the peace loving and democratic forces present in Ethiopian society and having varied views, having met in a conference convened from July 1-5 in Addis Ababa, have discussed and approved the Charter laying down the rules governing the Transitional Government as well as setting down the principles of the transitional period.”³⁹ It is notable that various and diverse political groups had participated in the conference and approved the Charter. Although the English version does not expressly mention representatives, the Amharic version clearly states that these different forces participated through their representatives.

However, there remained criticisms that some significant political groups were deliberately excluded and weaker political parties were invited or even created overnight to participate in the conference⁴⁰. It is also noted that “the EPRDF deliberately excluded opposition groups when developing the legal and institutional framework for the new government.”⁴¹ Some writers provide details of what they judge to be “major flaws in the transitional conference procedures” and the resulting EPRDF’s absolute control of “all the significant events that occurred during and after the transition.”⁴²

Nevertheless, the Charter was meant to serve as an interim constitution for the transitional period, and for its implementation, an 87-seat Council of Representatives was created

Journal[online]. 1(2). [Accessed on 25 June 2013]. Available from the World Wide Web: <<http://scholarship.wm.edu/cgi/viewcontent.cgi?article=1542&context=wmborj&sei>>. P. 205

³⁷ COHEN, R. and H. GOULBOURNE(eds.). 1991. *Democracy and Socialism in Africa*, Boulder, Sanfrancisco and Oxford: Boulder. cited in MERERA GUDINA. 2012. *Ethiopia: A Transition Without Democractization*. [online]. [Accessed on 15 February 2013]. Available from World Wide Web: <http://www.oromopeoplescongress.org/docs/ethiopia-transition-without-democracy-Merera.pdf>

³⁸ This can be inferred from paragraph 6 of *Transitional Period Charter of Ethiopia*, Above n 33.

³⁹ *Transitional Period Charter of Ethiopia*, Above n 33, Paragraph 6.

⁴⁰ GUDINA, M, Above n 37 at 5

⁴¹ ALEMANTE G. SELASSIE. [year-unable to determine]. Ethiopia: Problems and Prospects for Democracy. William and Mary Bill of Rights Journal[online]. 1(2). [Accessed on 25 June 2013]. Available from the World Wide Web: <<http://scholarship.wm.edu/cgi/viewcontent.cgi?article=1542&context=wmborj&sei>>, at 205. According to G. SELASSIE, the COEDF (the Coalition of Ethiopian Democratic Forces) was one of the political groups excluded from the London Conference and subsequent transitional processes. He noted “ the COEDF is an umbrella organization comprising various parties including the Ethiopian People’s Revolutionary Party (EPRP), which had waged armed struggle against the Dergue for 17 years.” See, pp. 212 and 213. It is evident here that the EPRP existed at the time of the transition but excluded from participation in the transition.

⁴² For details, see G. SELASSIE, Above n 41 at 218-22.

composed mainly of the representatives of the participating political groups.⁴³ However, the Charter also allowed for the possibility for prominent persons to be members of Council of representatives.⁴⁴ According to Article 9 of the Charter, this Council was the legislative organ during the transitional period, and it enacted different laws until a Constitution was adopted in 1994.⁴⁵ As part of this process, the transitional government (TGE) established in 1992 a Special Prosecutor's Office making criminal prosecution the main mechanism for the transitional process of accountability.

2.3 History as Presented by the Transition

We noted the definition of violations and perpetrators is a crucial aspect of attempts to address past violations. Although other mechanisms arguably existed,⁴⁶ the main transitional mechanism of accountability chosen for the Ethiopian process was criminal prosecution before national courts. In this respect, it was important to define violations and perpetrators that were to be subjected to investigation and prosecution; it is this that I refer to as the articulation of history of violation by the transition. So, how was the history of violation articulated? The answer to this question can be obtained from various sources including legislative documents, statements of officials, historical accounts, and the actual transitional process of accountability as it took place.

The understanding of the transition's articulation of history requires, first, a consideration of the predominant official articulation about past violations found in Proclamation Number

⁴³ GUDINA,M, Above n 37 at 5. According to Gudina, the participating political groups were represented based on a pre-determined quota by EPRDF.

⁴⁴ See *Transitional Period Charter of Ethiopia*, Above n 33, Article 7.

⁴⁵ see *Transitional Period Charter of Ethiopia*, Above n 33, Article 9. It provided that the Council of Representatives shall exercise legislative functions and oversee the work of the Council of Ministers.

⁴⁶ Such other processes included lustration, dismantling the military and secret services as well as the police force, institutional reforms. The dismantling of institutions of repression was specifically provided for by paragraph 5 of the preamble of the *Transitional Period Charter of Ethiopia*. The civil and political rights of former officials and military leaders and members of affiliate institutions were limited by law (see proclamation nos. 3/91, 23/92). Another transitional justice process is the restitution of property rights to those whose property had been confiscated by the Derg (see Proclamation no. 110/95, The Proclamation for the Review of Properties taken in Violation of the Relevant Proclamations; Directive No. 001/1996, A directive establishing the procedure for the restitution of properties). Although restitution might be seen as part of reparation, it is very limited to deprivations of property rights and cannot be a form of reparation for the massive civil and political rights committed during the Derg. In addition, its implementation was apparently limited even in case of deprivation of property rights.

22/1992.⁴⁷ The Transitional Government of Ethiopia (TGE) about a year after its establishment issued this law. This proclamation established the Special Prosecutor's Office (SPO), which was to play a central role in ensuring the process of accountability. As will be shown, in chapter 5, there was very little public debate and participation surrounding the enactment of the proclamation. As already, indicated, the transitional government was composed of a coalition of different political groups; its legislative organ (the Council of Representatives) was not composed of representative of the people but of the political groups. As such, there was no representative (indirect) participation in the law making process.

The Proclamation set out its *raison d'être* as well as the mandates and responsibilities of the Special Prosecutor's Office. The SPO was established even though there existed ordinary prosecutions offices and other law enforcement offices within the Ministry of Justice. In light of this, the justification for the establishment of a special organ may be questioned. However, in the face of the massive violations of human rights that took place over a long period, the establishment of a special organ to lead the accountability process was justified for expediting and accomplishing the task with the special attention and efficiency it required. The preamble of the proclamation provided the justification for the establishment of the SPO by asserting its necessity "to conduct prompt investigation and [prosecution]"⁴⁸. The Special Prosecutor's Office was, thus, given the mandate to *promptly* investigate and prosecute the massive human rights violations or offences committed over a period of years. While providing the terms of reference or scope of mandate of the SPO, the proclamation defined the perpetrators that fall under the investigative and prosecutorial jurisdiction of the SPO. Again, by defining the perpetrators the proclamation provided an account of the 'history' that was to inform the process of transition.

The most important parts of the proclamation articulating the history of violation are its preambles and the operative provision of article 6. Article 6 of the proclamation, which sets out the powers of the SPO, stated that;

⁴⁷ One should also note the articulation of violation in the *Transitional Period Charter of Ethiopia*, Above n 33. Paragraph 3 of the Charter expressly provided, "the military dictatorship was, in essence, a continuation of the previous regimes...."

⁴⁸ *Proclamation for the Establishment of the Office of Special Prosecutor*. Proclamation No. 22/1992, Federal Nagarit Gazette, 1st Year, No.18, August 8/1992. See paragraph 6 of the preamble of the proclamation.

The Office shall, in accordance with the law, have the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by *abusing his position in the party, the government or mass organization under the Dergue-WPE regime*.

From this provision, one can clearly see that the investigative and prosecutorial power of the SPO relates only to person who have committed human rights violations by abusing his position in the party meaning the WPE (Workers Party of Ethiopia), the government (the Dergue) or mass organization under the Dergue. The above-mentioned and other provisions provide that the Dergue-WPE and affiliated mass organizations were involved in the massive violations that took place during the Dergue regime, and hence they are subject to criminal investigation and prosecution.

An analysis of the preamble of the proclamation helps to understand some of the terms used under Article 6 as well as the narration of history of past violations and respective perpetrators. The proclamation provides, “the people of Ethiopia [were] deprived of their human and political rights and subjected to gross oppression under the yoke of the fascistic rules of the Dergue-WPE regime for... seventeen years”.⁴⁹ Further, it was stated, “heinous and horrendous criminal acts which occupy special chapter in the history of the peoples of Ethiopia [were] perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE regime”.⁵⁰ It was also stressed “officials and auxiliaries of the Dergue-WPE dictatorial regime...impoverished the economy of the country by plundering, illegally confiscating and destroying the property of the people as well as by misappropriating public and state property”.⁵¹ These statements in the preamble help us to understand the term “offence” under Article 6. Clearly, it referred to massive violation of human rights. Obviously, the actions of concern were the violations committed by the Dergue-WPE and its auxiliaries. Similarly, the proclamation asserted that

...it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time EPRDF assumed control of the

⁴⁹ *Proclamation for the Establishment of the Office of the Special Prosecutions*, above n 48, paragraph 1 of the preamble.

⁵⁰ *Proclamation for the Establishment of the Office of the Special Prosecutions*, *ibid*, paragraph 2 of the preamble.

⁵¹ *Proclamation for the Establishment of the Office of the Special Prosecutions*, *ibid*, paragraph 3 of the preamble.

country and thereafter and who are suspected of having committed offences, as well as representatives of urban dwellers associations and peasant associations, and other persons who have associated with the commission of said offences, must be brought to trial.⁵²

This statement is, first, indicative of what mass organizations mean under article 6 - it refers to urban dwellers and peasant associations. Secondly, by providing a list of the category of persons to be brought to trial, it helps us to better understand the articulation of ‘perpetrators’ under article 6 and the investigative and prosecutorial mandate of the Special Prosecutor’s office. Citing the provisions of the proclamation, Tronvoll argues that the investigative mandate of the Special Prosecutions office relates “only [to] the atrocities committed by the vanquished”.⁵³ The vanquished in this context refers to the Dergue and affiliate organizations. Apart from the definition of violations and violators, the proclamation stated that these violations were committed against the people of Ethiopia. From this, one can say the proclamation also defined the victims – it is the Ethiopian people as a whole, as a collective. Hence, it is clear that all aspects of Dergue’s violation were given equal importance irrespective of who the individual victims were. However, a question might arise as to what extent this collectiveness in the construction of victims has affected the transitional process framework. The emphasis on retribution rather than reparation, on collective output than individual-victim gains, as discussed in details in chapters five and six, is arguably the result of such construction of collective victimhood.

Tronvoll also states that the investigation concentrated on violations committed during the red terror campaign, where Mengistu Haile-Mariam targeted the Ethiopian Peoples’ Revolutionary Party (EPRP) as the main enemy due to its “contra-revolutionary activity”.⁵⁴ However, apart from defining the perpetrators, no provision of the Proclamation expressly limits the investigation to violations committed during the Red Terror. Nor did the proclamation define EPRP as a victim or the only victim. In fact, different historical accounts tell that the Red Terror campaign took place between 1976 and 1978,⁵⁵ and the Proclamation does not appear to limit investigation and prosecution to the violations committed during this relatively short period. Rather, the proclamation covered violations committed by the Dergue

⁵²Proclamation for the Establishment of the Office of the Special Prosecutions, *ibid*, paragraph 4 of the preamble

⁵³ TRONVOLL, K, Above n 30 at 90

⁵⁴ TRONVOLL, K, Above n 30 at 90

⁵⁵ See for example, TRONVOLL, K, Above n 30; BAHRU ZEWEDE, Above n 30 ; DE WAL, A, Above n 30.

throughout its regime. This is clear from the preamble as well as Article 6 of the proclamation. However, Tronvoll is right in his assessment that the investigations targeted only violations committed by the Dergue and its affiliates.

An interesting question is whether the position taken by the SPO proclamation in defining perpetrators took note of existing precedents. Charles Schaefer argues that the position taken by the SPO proclamation was partly influenced by the international community, especially by western governments, as evidenced from the following terms.

... the 1990s were a period when jurists had the upper hand and international legal opinion weighed heavily in favour of retributive justice. In this new era of democracy, there was a simultaneous commitment to transparency and accountability in political as well as judicial affairs. New players, the TGE included, had to play by those rules to gain the West's clientage and receive Bretton Woods's financial support.⁵⁶

This highlights that although internal reasons might exist, the decision to prosecute was made at a time when the international community "was reinventing itself and setting up universal political / judicial standards to which all countries were theoretically held accountable".⁵⁷ This internationalist approach apparently took note of previous practices of the Charter of the International Military Tribunal and the Nuremberg trials leading to the outlawing and criminalization of Nazi Organizations including the SS.⁵⁸ In a similar way, the

⁵⁶CHARLES SCAEFFER, The Red Terror Trials Versus Traditions of Restorative Justice in Ethiopia, In K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 70

⁵⁷CHARLES SCAEFFER, Above n 56 at 70. Charles notes that the TGE had two options that met the internationalist's criteria; "set up a truth commission or try the offenders in court; SA's TRC, though perhaps in the planning stages, was unknown to the Ethiopian leaders; the logical conclusion is that only prosecution was a right choice."

⁵⁸CHRISTIAN TOMUSCHAT, the Legacy of Nuremberg, *Journal of International Criminal Justice* 4 (2006), Oxford University Press, 2006. Available at <http://faculty.maxwell.syr.edu/hpschmitz/PSC354/PSC354Readings/TomuschatLegacyNuremberg.pdf>, p. 12. It is interesting to note the Charter of the IMT also provided for the prosecution of groups or organizations. Thus, "six organizations - among them the leadership corps of the Nazi party, the Government (Cabinet) of the German Reich, the General Staff and High Command of the German Wehrmacht and the SS - were defendants at the Nuremberg trial. This extension of the scope *ratione personae* of the indictment brought with it considerable difficulties. Only four of them (the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS) were found to be criminal. None of the texts governing the currently existing international criminal courts or tribunals has followed the Nuremberg example. It would be particularly difficult to accept states as defendants in criminal proceedings as well. Essentially, it would not be the state concerned but its people that would become the target of any punishment - over and beyond the consequences, which derive for a state from the commission of an internationally wrongful act. By definition, a trial against a state would be based on the assumption of collective criminal guilt - a notion implicitly rejected by the leaders of the four victorious Powers

SPO proclamation condemns the Derg, the WPE and affiliate institutions as criminal organizations. Sara Vaughan argues that the Ethiopian prosecution process was designed “to recast the Ethiopian state’s former rulers as its new ‘outlaws’ and reassert the return to “a more legitimate period, during which, for instance, the country had been one of an elite group of original signatories to the Nuremberg Charter in the Wake of the Second World War.”⁵⁹ This idea of return to the normalcy again embodies the internationalist dimension in the SPO framework. Clearly, the SPO proclamation denounces the Derg and its affiliates for the massive human rights violations. However, in empowering the SPO, the law underlines individual criminal responsibility rather than a collective one. Nevertheless, as evident from the discussions in the subsequent sections and in chapter 5, whether such a stand-alone interpretation of violations and perpetrators was appropriate is a highly contested issue of the Ethiopian transitional justice process.

The decision to hold the Dergue accountable was allegedly made even before the fall of the Dergue. It was noted that the TPLF/EPRDF had already decided prior to the fall of the Dergue that the Dergue/WPE officials should be made judicially accountable for their violations.⁶⁰ This statement by the highest official of the government also indicates the articulation of violation during the transition. Arguably, the Transitional Government of Ethiopia formally adopted this stand in August 1992 through proclamation No. 22/1992.⁶¹ In fact, the proclamation refers to what it called “the historical mission of the Ethiopian People’s Revolutionary Democratic Front (EPRDF)”⁶². This may be indicative of the extent to which EPRDF might have influenced the articulation and presentation of past violence during the transition.

who opted in favour of a trial against the main war criminals who had not only launched a criminal war, but had also killed millions of their own citizens. On the other hand, to impose on a people sanctions, which suffocate it, denying it any opportunity to join the other nations, would not only be politically disastrous, as shown by the aftermath of the unfortunate Treaty of Versailles. It would at the same time amount to a blatant violation of the rights of the members of the succeeding generations who should bear no responsibility for the misdeeds committed by their fathers and forefathers.” See, CHRISTIAN TOMUSCHAT from pp. 12

⁵⁹SARAH VAUGHAN, 2009, The Role of the Special Prosecutor’s Office, In K., TRONVOLL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 59

⁶⁰ Statement of Prime Minister Meles Zenawi as reported by TRONVOLL, K, Above n 30 at 91

⁶¹ TRONVOLL, K, Above n 30 at 93

⁶² Proclamation for the Establishment of the Office of the Special Prosecutions, Above n 48, paragraph 4 of the preamble: “...it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time of the EPRDF assumed control of the country and thereafter...must be brought to trial”. This assertion implies the detention of former officials for violations preceded the enactment of the proclamation.

Another important element in understanding the articulation of past violence is to consider what actually happened before and after the enactment of the Proclamation. Immediately upon the fall of the Dergue and EPRDF's control of the country, a lot of Dergue-WPE officials as well as military and security personnel were detained. As far as the government in control carried these out during the transition, they formed part of the official articulation of history. The fact that such officials were detained before the enactment of the proclamation was recognized by the Proclamation itself.⁶³ Clearly, the criminal justice processes that followed the enactment of the proclamation (detentions, investigations and prosecutions) were targeting the Dergue-WPE and affiliated organizations.

Thus, legal instruments and official statements and actions were indicative of how the transition presented the history of violation. The official narrative was that the Dergue and its affiliates were the perpetrators of human rights violation during the seventeen years of its military rule. This appears to suggest that the Dergue and its affiliates were the only perpetrators. By so defining the perpetrators, it defines violations as only those committed by the Dergue. Thus, the investigative and prosecutorial mandate of the Special Prosecutor's Office was directed against violations committed by the Dergue and its affiliates only. It is important to consider briefly whether historical accounts support this version of the official history of violation.

We might first observe that the literature on the Ethiopian revolution and its consequences as well as human rights literature and reports do indeed provide detailed descriptions and analyses indicating massive violations of human rights committed by the Dergue throughout its rule.

The Ethiopian historian, Professor Bahru Zewde, while comparing the Ethiopian revolution with the French and Russian revolution that gave birth to Napoleon and Stalin respectively, stated, "... the Ethiopian [revolution] delivered the country to the murderous regime of Mengistu Hayla-maryam".⁶⁴ Noting the beginnings of the mass killings, Zewde asserted that "on 24 November 1975 the [Dergue] announced to a shocked national and international audience that it had shot its chairman, Aman Andom, and executed some sixty people it had

⁶³Proclamation for the Establishment of the Office of the Special Prosecutions, Above n 48, paragraph 4 of the preamble

⁶⁴ ZEWDE, B, Above n 30 at 229

held in detention, most of them dignitaries and high functionaries of the imperial regime.”⁶⁵ Soon after, the Dergue apparently killed the Emperor and the Patriarch of the Ethiopian Orthodox Church.⁶⁶ Certain sources indicate these executions were part of the Red Terror, although most accounts limit the period of the Red Terror to the years between 1976 and 1978.⁶⁷ However, that these mass executions amounted to gross violation of human rights is beyond doubt.

After eliminating the Emperor and highest officials of the imperial regime, the Dergue directed its violence against opposition political groups that it considered enemies of the revolution and the nation. The campaign to eliminate opposition political groups, officially dubbed as the Red Terror, took place in the capital as well as throughout the main cities between 1976 and 1978. The Red Terror signified an extreme political violence involving killings, detention, torture, and disappearances. Historical accounts indicate that the Red Terror was originally directed against opposition groups that raised urban resistance to the Dergue in Addis Ababa and in other main cities. The Red Terror campaign in Addis Ababa was the most severe and led to summary executions, detention, torture and disappearance of many people, mostly the young and the educated. The exact number of victims is not known. According to one account, a minimum of 10, 000 people were killed in Addis Ababa alone.⁶⁸

While the killings and detentions were most numerous and most publicized in Addis Ababa, the campaign was also conducted throughout the country.⁶⁹ Many people mostly the young severely suffered in different places including Gonder, Bahir Dar, Jimma, Tigray, Debre Markos, Dessie, Kombolcha, Harerghe, Sidamo, Bale, Shewa (Chebo & Gurage), Gojjam.⁷⁰ In some cases, people were rounded-up and shot in market places.⁷¹ The overall human cost

⁶⁵ ZEWDE, B, Above n 30 at 238

⁶⁶ Human Rights Watch,, *Ethiopian Dictator Mengistu Hailemariam* [online]. [Accessed on 14 November 2008]. Available from World Wide Web: < <http://hrw.org/english/docs/1999/11/29/ethiop5495.htm> >

⁶⁷ See the Victims of Red-Terror Memorial Website at World Wide Web: http://www.ethiopians.com/qey_Shibir.htm

⁶⁸ DE WAL, A, Above n 30 at 110. See also MATSUOKA, A and SORENSON, J. 2001. *Ghosts and Shadows: Construction of Identity and Community in an African Diaspora*. Toronto: University of Toronto. The latter source estimate the death as a result of red terror to be 5, 000. The number of those who escaped death but subject to detention, torture and disappearances was numerous.

⁶⁹ DE WAL, A, Above n 30 at 108

⁷⁰ For details see DE WAL, A, Above n 30 at 108. Among these, the Red Terror in Tigray was claimed as the worst next to that in Addis Ababa. The situation was aggravated by the existence of different armed opposition movements because people suspected of supporting any of these movements were targeted.

⁷¹ DE WAL, A, Above n 30 at 108. For more details see Above n 30 at 109

of the Red Terror remains unknown as De Wal clearly observed “nobody knows how many people were killed, imprisoned, or forced to flee abroad on account of the Red Terror.”⁷²

Another historical account states, “the Dergue organized throughout much of the country a deliberate terror to sustain its rule, a large scale system of summary executions, torture, and disappearances. Thousands perished and many thousands more suffered physical abuse from state-sponsored violence.”⁷³

Dr. Yacob also observed, “the atrocities perpetrated by the Dergue, especially against the youth, drenched the country in a bloodbath to an extent heretofore unknown in Ethiopian history.”⁷⁴ Edward Kissi for his part indicates that “Dergue issued hundreds of orders” and “directives” to state agents and revolutionary cadres to kill”.⁷⁵ Nevertheless, the numbers killed can be counted not in the hundreds but in the thousands.

De Wal expressed the severity of the violations in the following terms:

History offers few examples of revolutions that have devoured their own children with such viciousness and so much cruelty. It can be estimated that, out of ten civilians who had actively worked for a radical transformation of Ethiopia, only one escaped arrest, imprisonment, torture, execution or assassination. The revolution swallowed the whole of the young generation of Ethiopian intellectuals, which are literates.⁷⁶

Matsuoka and Sorenson assert, “[a]lmost a whole generation of young, urban, educated Ethiopians was wiped out” during the Red Terror.”⁷⁷ In addition, the Red Terror also affected other sections of the society. It included the killings of merchants in Addis Ababa as well as

⁷² DE WAL, A, Above n 30 at 110. We may note “a minimum of 10, 000 were killed in Addis Ababa alone in 1977, and probably a comparable number in the provinces in 1977 and 1978.” Moreover, “a large number were detained, and subjected to appalling prison conditions and torture.” p.110

⁷³ JAMES C.N. PAUL, *Human Rights and the Structure of Security forces in Constitutional Orders*, The Case of Ethiopia, 3 WM.and marry Bill Rts J. 1.244 (1994), cited in YACOB HAILE-MARIAM, *The Quest for Justice and Reconciliation: the International Criminal Tribunal for Rwanda and the Ethiopian High Court*, *International and Comparative law Review*, 667 (1998-1999), at 677

⁷⁴YACOB HAILE-MARIAM. (1998-1999). *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, *International and Comparative Law Review*, p. 676

⁷⁵ KISSI, E, Above n 31 at 119

⁷⁶ DE WAL, A, Above n 30 at 111

⁷⁷MATSUOKA, A and SORENSON, J, Above n 68 at 33. For detailed account of these violations see at 33 -34.

in the provinces for the alleged commission of what was called economic sabotage during the red terror and the preceding years.⁷⁸ The red terror measures also targeted peasants and uneducated towns people.⁷⁹

It may be appropriate to ask what makes the Red Terror quite different from other pasts of violence in Ethiopian history. John Abbinik, while arguing that indiscriminate violence and terror against the population were not new in Ethiopian history, noted, “[t]he Red Terror, due to its ideological content and unscrupulous nature, marked a new level of performance, going way beyond [previous] practices”.⁸⁰ Arguably, the Red Terror “accurately reflects the way in which excessive violence was used to terrify the population and eliminate dissent”.⁸¹ The Red Terror was classified as “one of the most systematic uses of mass murder by the state ever witnessed in Africa”.⁸² Tefesse Olika, an Ethiopian historian, has similarly noted that:

the Dergue’s red terror was an officially sanctioned execution of citizens in [broad] day light. It was an indication of total reigning of the rule of the jungle in the country under military regime. Arbitrariness in decisions and unmitigated use of violence became the *modus operandi* of the military regime. There was no part of the country and no section of the population that had not been affected by it....⁸³

We may say that a culture of severe form of political violence had emerged characterizing the whole period of Mengistu’s regime. It is noted, “the Red Terror led the Dergue directly to an addiction to rule by terror.”⁸⁴ In the same way, Zewde stated that the Red Terror “signifies the climax of a cult of political violence and had impacted the political orientation of the country.”⁸⁵ He described the impact as “united by the shedding of blood, members of the [Dergue] realized that there was no going back”.⁸⁶ Thus, different accounts provide that the

⁷⁸ DE WAL, A, Above n 30 at 105-107 and 111

⁷⁹ DE WAL, A, Above n 30 at 111. See also MATSUOKA, A and SORENSON, J, Above n 68 at 33. They state that the massacres also took place in rural areas.

⁸⁰ ABBINK, J. 1995. *The Impact of Violence: The Ethiopian ‘Red Terror’ as a Social Phenomenon*, Leiden: African Studies Centre [Online]. [Accessed on ----]. Available from World Wide Web: <http://openaccess.leidenuniv.nl/bitstream/handle/1887/9092/ASC-1242160-029.pdf?sequence=1>, p.136. For more details on how violent acts were committed, see at 137.

⁸¹ DE WAL, A, Above n 30 at 101

⁸² DE WAL, A, Above n 30 at 101

⁸³ OLIKA, T, Above n 32 at 13

⁸⁴ DE WAL, A, Above n 30 at 111

⁸⁵ ZEWEDE, B, Above n 30 at 239

⁸⁶ ZEWEDE, B, Above n 30 at 239

cult of political violence continued throughout the Dergue's regime and caused massive violation of human rights.

The idea of the cult of political violence implies that the violations committed by the Dergue did not stop with the end of the Red Terror period. This leads us to the consideration of other contexts of massive violations. Historical accounts indicate that the understanding of massive human rights violations by the Dergue requires consideration of contexts outside of the narrow period of the Red Terror campaign. These contexts of massive violation of human rights, among others, relate to; (1) civil war or "counter-insurgency warfare" (or internal armed conflict), (2) famine, (3) resettlement programs, and (4) villagization campaigns.

One crucial context in understanding the post-Red Terror violation is to consider Dergue's engagement in internal armed conflict or what was called "counter-insurgency warfare" against different rebel groups on various fronts. Edward Kissi observed, "after eliminating...the EPRP, the Dergue next turned its attention to the ethno political groups."⁸⁷ Dergue's counter-insurgency campaign resulted in violent and abusive acts. These included (1) repeated military offensive, involving abuses against civilians, including indiscriminate aerial bombardment (2) the bombing of market places, (3) military offensive against harvest and cattle, (4) forcible relocation of civilians, (5) the imposition of strict bans on movements etc.⁸⁸ The counter-insurgency operations targeted not only rebel groups but also any one who was ethnically related to the rebels groups.⁸⁹

Several accounts indicate that civilians were the target of Dergue's military actions. The main distinguishing character of the war was "its indiscriminate violence against civilians by the Ethiopian army and air force."⁹⁰ Similarly, it is noted, "the army deliberately killed and wounded tens of thousands of civilians, and the air force bombed civilians and civilian

⁸⁷ KISSI, E, Above n 31 at 119. We should keep in mind that the Red Terror and the counter insurgency warfare overlapped in some places. The Dergue was engaged in warfare with several rebel forces on various fronts. These rebel fronts included the Western Somalia Liberation Front (WSLF), the Oromo Liberation Front (OLF), and the Sidama Liberation Front in the South East and South. In the north, the Dergue was fighting the Tigray Peoples Liberation Front (TPLF), which later became EPRDF, and the Eritrean Peoples Liberation Front (EPLF). The Dergue was also fighting in the Western and South Western fronts with the EPRP (which latter came into conflict with the EPRDF) in Western Gojjam, and OLF in Western Wollega. These were some of the armed opposition groups against which the Dergue shifted its attention after crushing the urban opposition.

⁸⁸ KISSI, E, Above n 31 at 119. For more details see at 11- 13.

⁸⁹ KISSI, E, Above n 31 at 119. Kissi observes, "...the Dergue attempted to transform its persecution of political groups [including the rebels groups] into mass murder of people on the basis of their biological affinity with members of ethno-political opposition groups". p, 119

⁹⁰ DE WAL, A, Above n 30 at 3

targets”.⁹¹ Moreover, various sources suggested that as the TPLF-EPRDF strengthen its military attack and scored victories; “the government continued to fight the war with total disregard for the rights of civilians, and the army and air force engaged in reprisal killings of civilians”.⁹² A typical example in this regard was the aerial bombardment and destruction of the market town of Hauzein, in Northern Tigray, which has been characterized as a deliberate killing of which thousands of innocent men, women and children.⁹³ Moreover, prisoners of war were also victims of Dergue’s action.⁹⁴

Other accounts of massive violation by the Dergue relate to the famine of 1984, one of the most severe famines to have occurred in the country’s recent history. The famine could be attributed to a number of factors including bad government economic policies and political instability. This is clearly noted in the following terms:

The beginnings of 1983-6 drought and resultant famine can be traced to the intermittent food crises of the previous decade, combined with the political chaos that reigned between 1976 and 1978, and the Derg’s attempt to implement its socialist development strategy despite adverse conditions.⁹⁵

Some emphasize on the bad policies of the Derg. Thus, it was observed, “the famine resulted from [Derg’s] efforts to implement its revolutionary policies despite being ill-equipped to make these work, especially in the face of strong international opposition.”⁹⁶ However, what is worth noting here is the allegation that it resulted from government’s deliberate actions as part of counter-insurgency strategy.⁹⁷ According to this view, the famine was an artificial creation, which could have been prevented/mitigated had the Dergue refrained or

⁹¹ DE WAL, A, Above n 30 at p.3

⁹² DE WAL, A, Above n 30 at 14

⁹³ DE WAL, A, Above n 30 at 257. There are also detailed accounts of the atrocities committed by the counter insurgency military campaign.

⁹⁴ DE WAL, A, Above n 30 at 106. In this respect, De Wal noted that “prisoners of war were attacked by government airplanes, and were subjected to... torture”

⁹⁵ EDMOND J. KELLER, *Drought, War and the Politics of Famine in Ethiopia and Eritrea*, The Journal of Modern African Studies, 30, 4(1992), Cambridge University Press, at 616 [Online]. Available at the World Wide Web: <http://www.sscnet.ucla.edu/polisci/faculty/keller/papers/SelectedPub/DroughtWarPolitics.PDF>, citing Gopalakrishna Kumar, *Ethiopian Famines, 1973 – 1985*; a case study, United Nations University, World Institute for Development Economics Research, Wider Working Papers No. 26, at 26.

⁹⁶ EDMOND J. KELLER, Above n 95, at 21

⁹⁷ DE WAL, A, Above n 30 at 12-13. (De Wal). Detailed discussion of how such strategies led to famine and its consequences is provided in at 133-176

discontinued the measures that caused the famine.⁹⁸ It can be understood that government counter-insurgency measures contributed to the famine that claimed the lives of many.⁹⁹ There are also accounts that the Dergue utilized humanitarian relief as a weapon of war.¹⁰⁰

The Dergue's resettlement program, arguably, had resulted in human rights violations. The resettlement plan was officially launched immediately after the disclosure of the famine of 1984 by the media, and it was presented as a "famine relief measure."¹⁰¹ According to Ramhato, "Resettlement under the Derg had multiple objectives: it was meant to promote food security, to relieve the population pressure of the vulnerable areas, and to bring about the environmental rehabilitation of these same areas. In the end, none of these objectives were achieved and yet the cost in human lives and resources was immense."¹⁰² This is indicative of the human rights violations related to the resettlement program. The more critical view is that the resettlement program was a counter-insurgency measure. Thus, Kissi notes, "the Dergue's poorly-planned and hastily implemented resettlement program, from October 1984 to February 1986, was intended as a counter-insurgency strategy to intimidate and isolate potential peasant recruits of the TPLF and EPLF".¹⁰³ The resettlement programs were even considered as concentration camps.¹⁰⁴ Despite its expressed or hidden purposes, the implementation of the resettlement program had resulted in human rights violations including the loss of life.¹⁰⁵

⁹⁸DE WAL, A, Above n 30 at 133. In the words of De Wal, "had the artificial famine creating actions not continued, major famine could have been averted"

⁹⁹DE WAL, A, Above n 30 at 176. [13-176]. It is noted, forced relocation, which itself was viewed as a counter-insurgency strategy in east and south, was an additional factor for famine in southern provinces. According to De Wal the famine killed in excess of 400,000 people and "most of these deaths can be attributed, not to the weather, but to the government's gross violations of human rights." See at 13.

¹⁰⁰KISSI, E, Above n 31 at 128. See also DE WAL, A, Above n 30 at 11, see also at 10, 11 & 156 of same.

¹⁰¹DE WAL, A, Above n 30 at 211

¹⁰²DESSALEGN RAHMATO, Resettlement in Ethiopia, The Tragedy of Population Relocation in the 1980s [Online]. Available at <http://www.fssethiopia.org/publicationfile/discussion%20paper%20no%2011.pdf>, at 5 and 6. According to RAHMATO, "in the period 1984-1986, the Derg resettled some 600,000 people, most of whom were from the northern highlands; the areas of settlement were for the most part the lowlands of western Ethiopia. In this same period, some 33,000 settlers lost their lives due to disease, hunger and exhaustion. An untold number of families were destroyed, and, for many years after, a number of NGOs were still engaged in attempting to reunite thousands of children who had been separated from their parents at the time of settler relocation."

¹⁰³KISSI, E, Above n 31 at 128

¹⁰⁴EDMOND J. KELLER, Above n 95

¹⁰⁵DE WAL, A, Above n 30 at 14. These violations include "the violent and arbitrary manner in which resettlers were taken, appalling conditions in transit and on arrival, the displacement of indigenous people in the resettlement areas, and violence against re-settlers who attempted to escape, including enslavement...". For the loss of life see DE WAL, A, Above n 30 at 227; See also at 14. At least, 50,000 people are estimated to have lost their life.

Another point of consideration is the villagization program, which the Dergue began to implement in late 1984. Again, despite the stated objective by the government, historical accounts claim that the villagization program was used as a strategy to deal with insurgency.¹⁰⁶ The villagization programme was as problematic as the resettlement program and involved massive human rights abuses.¹⁰⁷ The implementation of the program involved coercion and violence, especially in war zones.¹⁰⁸

In general, the sources discussed above support the official articulation of past violence by the transition. Clearly, the Derg had committed gross and systematic violations of human rights throughout its entire rule by utilizing all state machineries and affiliated institutions in eliminating dissent as well as indiscriminate attack against innocent people. These accounts provide the justificatory basis for the transition's articulation and presentation of the Derg and affiliated institutions as perpetrators of human rights during the 17-year military rule of Mengistu Haile-mariam. Accordingly, the transitional process of accountability focused on violations committed by officials and military personnel of the Derg and affiliated institutions. Finally, although some sources indicate the prosecution emphasised on violations committed against the EPRP, the transitional process generally depicts the Ethiopian people as victims of Dergue's acts of violations.

To conclude, in light of the numerous historical accounts available, the massive violations committed by the Dergue can neither be denied nor justified. Thus, the approach that sought to subject members of Dergue-WPE to the transitional process of accountability in order to depart from a culture of violence and human rights violations is understandable. However, the question remains: was the articulation of history of past violence and human rights violation complete? Was the history presented the whole history? In other words, were not *other actors* involved in violations during the Dergue era? Is the presentation of history as stated in proclamation number 22/1992 or elsewhere open to question? These questions are addressed in the following section.

¹⁰⁶DE WAL, A, Above n 30 at 231. See also at 14

¹⁰⁷EDMOND J. KELLER, Above n 95. See also DE WAL, A, Above n 30 at 14.

¹⁰⁸ DE WAL, A, Above n 30 at 14. For more see DE WAL, A, Above n 30 at 232. For example, there are accounts that the villagization in Hararge, where the OLF was based, was implemented by force and with massive violation of human rights, which involved killing (sometimes mass execution), burning of houses and crops, killing or confiscation of cattle, mutilation, rape, torture etc. The villagization and resettlement program in Gojjam also led to large-scale violation of human rights during the 1989-91. For this see DE WAL, A, Above n 30 at 15

2.4 Other Histories and Implications

In this section, I explore and present various sources that provide other telling of the history of violence and human rights violations committed during the period of the Dergue's military regime-between 1974 and 1991. These accounts, while not rejecting Dergue's responsibility (rather, affirming it), also asserted that *other actors* did use violence and committed human rights violations. These accounts relate to (1) the violations committed by the different opposition political groups in advancing their political goal and (2) the violations committed by individuals in pursuing their own exclusive interests.

Although not extensively recounted, historical accounts indicate that, different opposition groups committed human rights violations in the course of their violent opposition to the Dergue as well as violent confrontation among themselves.

Although there was no significant ideological difference, the various political groups and the Dergue were fighting each other for controlling state power.¹⁰⁹ Such conflicts created the context for human rights violations. The first clashes, leading to massive violations, apparently took place between the Dergue and the civilian urban opposition political groups, particularly the Ethiopian Peoples Revolutionary Party (EPRP). It is claimed that although EPRP, like Me'ison, shared Dergue's rhetoric of socialist revolution, it raised strong opposition to the Dergue and "battled the regime for State control".¹¹⁰ Arguably, the EPRP was the most radical and ideologically communist of the opposition groups that sought to integrate the ethnic-based opposition to the Dergue in to a broader-based "class struggle" against the military regime.¹¹¹ This apparently brought the EPRP into conflict not only with the Dergue but also with ethnic-based opposition groups- mainly the Tigray Peoples Liberation Front (TPLF). Thousands of EPRP leaders and followers perished in the party's ideological and power struggles with the Dergue and the TPLF.¹¹² Saving the EPRP-TPLF conflict for a later discussion, many accounts present the EPRP as the primary victim of Dergue's Red Terror.

¹⁰⁹ As indicated earlier, both the Dergue and opposition groups had a socialist orientation.

¹¹⁰ MATSUOKA, A and SORENSON, J, Above n 68 at 33

¹¹¹ KISSI, E, Above n 31 at 82

¹¹² KISSI, E, Above n 31 at 82

However, as noted earlier, a full understanding of the history of violence and human rights violations requires consideration of the whole context - a context beyond what is commonly referred to as the Red Terror. It is contended that in studying the Red Terror, it is also important to put the 'White Terror' into context.¹¹³ The White Terror refers to an urban-armed opposition campaign launched by the EPRP. This campaign targeted members of the Dergue and their supporters (or people believed to be supporters). In this respect, one author asserted that "...not only the regime's [Dergue's] security forces, revolutionary squads (Abiyot teibeka), cadres, and special death squads, but also the squads of the Ethiopian People's Revolutionary Army (EPRA), EPRP's military wing, hunted and killed people "in defence of the revolution".¹¹⁴ This is an indication of the involvement of EPRP in past violations. Thus, it is observed that the "white terror also caused the liquidation of the most educated citizens of the country."¹¹⁵ Personal experiences and observations of people are indicative of the extent of violations committed by the EPRP. One such personal testimony asserted that the EPRP was involved in:

Killing whole families, hanging children in schoolyards, gunning down husbands waiting in cars for their wives and fathers dropping their kids at school, assassinating young members of a family and dumping the bodies in front of the house, so as to shock and brutalize the rest of the family.¹¹⁶

This statement and other accounts suggest that like the Red Terror, the White Terror led to violations of human rights. According to one account, EPRP killed 1319 people thought of Dergue members or supporters in Addis Ababa within few months.¹¹⁷ Both terror campaigns – the red terror and the white terror - resulted in human rights violations.¹¹⁸ Zewde asserted that "the labels 'white terror' and 'red terror' are clearly subjective, and they are intended to

¹¹³OLIKA,T, Above n 32 at 13

¹¹⁴OLIKA,T, Above n 32 at 13

¹¹⁵OLIKA, T,Above n 32 at 13

¹¹⁶OLIKA, T,Above n 32 at 13

¹¹⁷ A preliminary objection presented against SPO charges, SPO file No.62/85 (copy with the author). Accordingly, these happened as of September 1976, and arguably, the killings stopped because of the red terror

¹¹⁸OLIKA,T, Above n 32 at 13, He observed this as "under the name of red terror and white terror, people were just slaughtered."

condemn one form of terror and justify another.¹¹⁹ Despite the differences in the identity of the campaigners and victims as well as impact, the red terror-white terror concepts by themselves suggest the use of political violence that had huge human rights implications. Both were forms of terror and violence launched by political groups against each other. However, the questions who started the violence and when did it start remain controversial. A historian puts the controversy in the following words;

“there is far from unanimity as to when the terror started, just as the issue who started it is contentious. In this respect, history has become as much a battle ground as the political violence itself”.¹²⁰

In addition, the issue as to responsibility is one that is contested. In this respect, it has been noted, “no independent research has been done on the question who really was responsible for the ‘genocide’ and human rights violations committed during those days”.¹²¹ Toggia generally observed that “the political development of the 1970s signifies the intense power struggle within the derg, against the derg and among the other Marxist-oriented parties, mainly to configure the revolutionary transformation of a traditional semi-feudal society into a socialist one.”¹²² They had become irreconcilable political groups though they shared socialist political ideology. Thus, “the uncompromising bloody power struggles steered all the political antagonists to their own decimation and demise.”¹²³ Arguably, this is one of the issues that the Ethiopian transitional justice process might be expected to address. A consideration of the available literature provides different and some times conflicting accounts that can be formulated into three categories: (1) Dergue’s action as a response to violence, (2) Red Terror as the cause for violence, and (3) Dergue’s action as an intervention in a conflict among the civilian opposition.

¹¹⁹BAHRU ZEWEDE. 2009. The History of the Red Terror: Contexts and Consequences. In : K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 25

¹²⁰ZEWEDE,B, Above n 119 at 24

¹²¹OLIKA, T, Above n 32 at 14

¹²²PIETRO TOGGIA, The Revolutionary Endgame of Political Power: The Genealogy of ‘Red Terror’ in Ethiopia, Research Article, *African Identities*, Vol. 10, No. 3, August 2012, 265–280, Routledge.[Online]. Available at the World Wide Web: <http://www.tandfonline.com/doi/pdf/10.1080/14725843.2012.715455>, at 266. It is noted “In this respect, each one of the Ethiopian Marxist groups mapped the so-called ‘correct mass line’, exclusively based on its own political party programme. Hence, with sectarian assertions for political and organisational leadership of the revolution, the power struggle was further intensified. Nonetheless, the political declarations of these organisations fundamentally reassured the people that the struggle was for the emancipation of the oppressed classes of Ethiopia.”

¹²³PIETRO TOGGIA, Above n 122 at 266

(a) Dergue's action as a response to violence.

One view relating to who started the violence holds that it was the EPRP's political violence (or white terror) that led to red terror as a Dergue response. The narration presented by Me'ison leaders or members clearly present the EPRP as the culprit who inaugurated the armed combat [*tingnq*] in 1976.¹²⁴ This was evidenced by "... the strident declarations of the EPRP in early September [of 1976] and the intimidating tactics (*taraba buden*) it had begun to use even earlier".¹²⁵ The central idea is that "it was the EPRP's terrorist policies that encouraged the new phase of PMAC repression".¹²⁶ This view is supported by Olika who asserts, "the red terror was the Dergue's response to the EPRP's urban guerrilla warfare that was unleashed with its assassination attempt on Mengistu, the First Secretary of the Derg, in late September 1976".¹²⁷ Hence, Dergue's Red Terror was a counter response to EPRP's White Terror.

(b) Dergue's action as the cause of violence

According to some sources, the central cause for the violence that erupted in 1976 was Dergue's campaign of the Red Terror. This view presents the White Terror as a self-defence against the red terror. This apparently is EPRP's version of the story. Zewde states that 'EPRP historians are at pains to argue that the EPRP only reacted to the preparations being made by the Dergue and its POMOA [Provisional Office for Mass Organizational Affairs] allies in late August 1976 for a war of annihilation against the EPRP.'¹²⁸ In support of their version, EPRP members refer to the violent nature of the Dergue even before the Declaration of the Red Terror.¹²⁹ According to EPRP, its "resort to armed struggle in September 1976 was a counter-offensive".¹³⁰ Therefore, these accounts indicate that Dergue's violence and

¹²⁴ZEWDE,B, Above n 119 at p.25

¹²⁵ZEWDE,B, Above n 119 at 25. Citing different sources, Zewde argues, "this sentiment is echoed in some of the works on the Ethiopian revolution"

¹²⁶ZEWDE,B, Above n 119.

¹²⁷OLIKA,T, Above n 32 at 14

¹²⁸ZEWDE,B, Above n 119 at 25. In this respect, it is claimed that "the campaign was officially launched on 11, Septmeber, when the EPRP was accused in the media of various acts of counter-revolution and economic sabotage"

¹²⁹OLIKA,T, Above n 32 at 14. Taffesse presents EPRP's assertion that "the Dergue's extra judicial killings predated the declaration of the red terror". It was also indicated that 'the EPRP present[ed] the summary execution of the former government officials [meaning officials of the imperial regime] in December 1974 as evidence that the Dergue's terrorist actions and violations of human rights had been in process since 1974'

¹³⁰OLIKA,T, Above n 32 at 14

repression existed even before the declaration of the Red Terror, and that rather than the cause for Dergue's repression, EPRP's action was an act of self-defence.

(c) Dergue's action as an intervention.

The third version was that the terrors originally resulted from the conflict between EPRP and Me'ison - two civilian urban opposition groups at the time. It was asserted that "the waves of 'white vs. red terror' that engulfed the country were started by EPRP and Ma'ison against each other and the Dergue joined in on behalf of the latter".¹³¹ As Toggia observed:

The EPRP, on one hand, vehemently opposed the military derg as a 'fascist regime', calling for its unconditional and immediate replacement with the Provisional People's Government since September 1974. On the other hand, Me'isone temporarily allied with the derg through its 'critical support' policy for about 16 months (mid-April 1976–mid-August 1977), striving to outlast its military rule with the formation of a national democratic people's government.¹³²

There was apparently irreconcilable differences between EPRP and Meison in their approach towards the Dergue, which ultimately led to conflict among them. This is apparently a pro-Dergue version of the story;¹³³ because it constructs the EPRP and Me'ison responsible for creating the violence, and the Dergue came in only to defend the Me'ison, which at the time, as indicated earlier, created a strategic alliance with the Dergue. There is yet another version that presented the Me'ison as the cause of the Red Terror.¹³⁴

These different accounts of the history of the Ethiopian revolution and the terrors and killings that followed are marred by accusations and counter-accusations among the different political groups active at the time. Clearly, there is no controversy as to the Dergue's violent actions during the Red Terror. However, historical accounts indicate that (1) other political groups

¹³¹OLIKA, T, Above n 32 at 15

¹³²PIETRO TOGGIA, Above n 122 at 266

¹³³OLIKA, T, Above n 32 at 15

¹³⁴ See OLIKA,T, Above n 32 at 15. As suggested by Olika, Me'ison is responsible on the "grounds that its choice of collusion course with the Dergue furnished the latter with a quasi-legitimacy and ideological support to consolidate its power and counter the civilian opposition violently including Me'ison itself". Me'ison was "also accused for having caused the failures of a coalition with other smaller political groups while it was yearning for primus inter pares (to be a powerful among "equals"). This coalition, known as EMALDH (Union of Ethiopian Marxist-Leninst Organization), was subsequently disintegrated and some of its members (Echat, for example) opted for micro-nationalism while others (Wez and Malerid) were co-opted in to the Derg regime."

were involved in violations while opposing the Dergue or fighting each other and (2) the context of human rights violations should be understood as extending beyond the very narrow period of the Red Terror.

Clearly, the various political groups resorted to violence to achieve political objectives of their own. Thus, “resorting to calculated violent and armed action in the name of class struggle became the rationale and modus operandi among all Ethiopian leftist movements of the time.”¹³⁵ This is true of the EPRP, which intended to create a socialist state in Ethiopia under the leadership of the proletarian party (EPRP), and denounced what it called the “imperialist (pro-American) ideological orientation of the Dergue and favoured the arming of peasants and workers to take over State power”.¹³⁶ It also claimed that the military were incompetent to guide socialist revolutions.¹³⁷ EPRP newsletters characterized Dergue’s revolution as a fascist one having no resemblance with a socialist revolution, and thus, EPRP launched “revolutionary violence against the Dergue and its supporters”.¹³⁸

Historical accounts also indicate that EPRP’s violence was directed not only against the Dergue but also against intellectuals and opposition political groups. It is claimed that former-student revolutionaries who were or appeared allied with (supported) the Dergue were targeted by the EPRP. The relationship between Me’ison and EPRP developed in to a violent one such that Professor Bahir notes, “the two organizations have clearly aligned themselves on opposite camps in the revolutionary process and were girding themselves up for the duel that killed them both.”¹³⁹ An EPRP newsletter described pro-Dergue intellectuals as reactionaries, betrayers of the student movement and pro-American, and thus marked them for eradication.¹⁴⁰

There are ample indications that EPRP and other opposition political groups resorted to violence against each other and supporters. One such example of violence was between EPRP and TPLF. After its failed urban resistance (opposition) to the Dergue, the EPRP attempted to

¹³⁵PIETRO TOGGIA, Above n 122 at 268

¹³⁶KISSI, E, Above n 31 at 82

¹³⁷KISSI, E, Above n 31 at 84

¹³⁸KISSI, E, Above n 31 at 82. It urged all Ethiopians to “do away with pests” (a reference to the Dergue and EPRP’s ideological enemies) and “erase the dust of Ethiopia’s history through [a] national democratic revolution [as] China..., Albania..., Vietnam...,Cambodia and Laos have done.”

¹³⁹BAHRU ZEWEDE, *The Quest for Socialist Utopia, The Ethiopian Student Movement c. 1960 – 1974*, Addis Ababa University, James Currey, 2014, at 258

¹⁴⁰KISSI, E, Above n 31 at 92

establish and launch a rural armed movement from Tigray. This brought EPRP, like the EDU, in conflict with TPLF, both of which had a Marxist orientation, but differed on what was called the “national question”.¹⁴¹ This difference led to violence. It was noted, “the leaders and supporters of the EPRP labelled members of the TPLF as *tebaboch* (narrow nationalists) and pass[ed] death sentences on them”.¹⁴² There is evidence that the EPRP used violence against the peasants if they refused to co-operate and prevented them from going to town markets believing that they might betray them to the Dergue.¹⁴³ It is also noted, “the TPLF in turn labelled the leaders and supporters of EPRP as *Adisochu Neftengoch* (the new chauvinists) and marked them for annihilation”.¹⁴⁴ Thus, eliminating the opponent characterized the political relationship between the EPRP and TPLF in 1976 and 1977.¹⁴⁵ Moreover, the animosity between the TPLF and EPRP, arguably, still exists as reflected in different ways.¹⁴⁶ Historical accounts also indicate a clash between the TPLF and EDU that affected not only members of the groups themselves but also their supporters. Some of the recent publications provide a detailed account of how TPLF decimated armed groups in the north that, although fought the Dergue, it considered its strategic enemies.¹⁴⁷

The struggle and conflict between EPRP and Me’ison also led to killings and human rights violations. While the EPRP argued that the military could not implement socialism and called for the establishment of a Provisional civilian government, Me’ison sought an alliance with the Dergue viewing it as the only organized group that could control the state in the power vacuum left by the emperor’s fall.¹⁴⁸ This and other differences seem to have triggered violence between the two civilian opposition groups. EPRP has been accused of carrying out

¹⁴¹MATSUOKA, A and SORENSON, J, Above n 68 at 36

¹⁴²KISSI, E, Above n 31 at 119

¹⁴³YOUNG, J. 1997. *Peasant Revolution in Ethiopia: The Tigray People’s Liberation Front, 1975-1991*. Cambridge University Press, at 105 -. Young also provides details relating to the reasons that led to the TPLF-EPRP armed clash and final defeat of the EPRP.

¹⁴⁴KISSI, E, Above n 31 at 119

¹⁴⁵KISSI, E, Above n 31 at 119

¹⁴⁶For more details, see TRONVOLL, K, Above n 30. These political groups consider themselves as antagonistic and irreconcilable political groups; It is not unusual to hear comments from some political figures still calling for the establishment of People’s Provisional Government (PPG) as a national solution; and the TPLF-EPRDF leaders accuse them for being undemocratic (not believe in elections) and of remnants of EPRP. One may see the difficulty this poses on questions of reconciliation. Or, it may even raise the need for reconciliation.

¹⁴⁷See GEBRU ASRAT, LUALAWINET ENA DEMOCRACY BE ITYOPIA, 2007 E.C, Addis Ababa (Amharic Version). It can roughly be translated as SOVEREIGNTY AND DEMOCRACY IN ETHIOPIA, 2014). This book was written by one of the founders and former member of the top leadership of TPLF.

¹⁴⁸MATSUOKA, A and SORENSON, J, Above n 68 at 33

“death sentences on Me’ison members who cooperated with the Dergue labelling them as ‘bootlickers’ and ‘banda intellectuals’ (meaning collaborators and quislings)”.¹⁴⁹

On the other hand, by giving support and cooperating with the Dergue, the Me’ison had contributed to the elimination of the EPRP and its supporters. In other words, “Me’ison cadres were given permission [by the Dergue] to kill suspected opponents of the regime [EPRP] on sight, and the EPRP was decimated.”¹⁵⁰ However, the alliance between the Dergue and Me’ison did not last, and Me’ison was attacked and its leaders killed following the attempted coup of 1977.¹⁵¹

The above historical accounts indicate that, apart from the massive violations committed by the Dergue, there is considerable evidence to indicate that other political groups also engaged in such violation of human rights. One position strongly asserted that “accusations and counter-accusations aside, the Dergue, EPRP, and Ma’ison each made, whatever the degree, its contributions to the ‘dirty war’ that consumed one productive generation of the Ethiopian people.”¹⁵² What is the implication of this? Does this mean only EPRP and Me’ison were wrongdoers? Does it mean all other opposition groups including the armed once were clean?

Some sources also indicated the involvement of various rebel groups in abuses, especially relating to the treatment of POWs;¹⁵³ and some of these of groups had bad human rights records.¹⁵⁴ The most radical account of the role of opposition and rebel was that *all opposition political groups* had contributed to massive violation of human rights. In this regard, Edward Kissi unequivocally states that “... [*all armed groups which opposed and eventually overthrow the Dergue, killed deliberately, indiscriminately and ruthlessly as the Dergue did.*”¹⁵⁵ [emphasis added]. Irrespective of the degree of involvement, and perhaps without neglecting the accounts about the good human rights performance of some

¹⁴⁹KISSI, E, Above n 31 at 119

¹⁵⁰MATSUOKA, A and SORENSON, J, Above n 68 at 33

¹⁵¹MATSUOKA, A and SORENSON, J, Above n 68 at 33

¹⁵²TAFESSE OLIKA, Above n 32 at 15

¹⁵³DE WAL, A, Above n 30 at 6

¹⁵⁴DE WAL, A, Above n 30 at 6

¹⁵⁵KISSI, E, Above n 31 at 112

rebels,¹⁵⁶ historical accounts implicate armed opposition groups in the violation of human rights and humanitarian law.

The above discussion demonstrates that the context of violation by opposition political groups go beyond what is commonly referred to red terror vs. white terror. The war (or armed clashes) fought on various fronts between the rebels groups against the Dergue and sometimes among themselves were considered as defining the context of violation. It is noted, “hundreds of the dead in Ethiopia did not fall at the hands of the Dergue alone, but also from that of political groups which opposed the Dergue”.¹⁵⁷ Nevertheless, the violation of human rights was not solely limited to the taking of life. Generally, we see from the above that the different political groups have used violence not only against the Derg but also against each other, which ultimately claimed the lives of their leaders, members, supporters and innocent civilians.

There is yet another aspect to the history of violence in this period. The climate of political violence among the different political groups had given individuals the opportunity to attack and eliminate their personal (private) enemies. We should also note that the terror and killings in Addis Ababa in “1976 and 1977 stemmed from settlement of private scores which had nothing to do with the revolution”.¹⁵⁸ Such self-interest motivated killings were not limited to Addis Ababa but took place in the provinces too.¹⁵⁹

I do not intend to make a judgment as to the responsibility of each of the actors during the 1970s and 1980s. Nor, is it suggested here that the different groups had equal or comparable responsibility. Rather, the argument is, first, that historical accounts provide different constructions of the history of violation. These accounts tell us there were various perpetrators and victims - with the possibility that a certain group was a perpetrator and a victim at the same time. Secondly, I argue that, in light of the different historical accounts, the history of violation articulated and presented in the transition is problematic. The problem with the articulation of history by the transition is not that it constructs the Dergue as a human rights violator; that the Dergue was engaged in massive violation of human rights by

¹⁵⁶See DE Wal, A, Above n 30. According to this source although allegations existed, TPLF and EPLF were generally praised for respecting human rights; and arguably, this won them public support in their struggle to end the military regime.

¹⁵⁷KISSI, E, Above n 31 at 119

¹⁵⁸KISSI, E, Above n 31 at 119

¹⁵⁹Personal conversation with former Cadre of the Dergue

using the state apparatus is beyond doubt. Clearly, there is no debate “over state involvement or whether the central government deliberately planned and directed the killing [and other human rights violations]”.¹⁶⁰ As Kissi clearly noted, many Ethiopians may not dispute this.¹⁶¹ Moreover, there is no dispute that the violations cannot be justified by any reason and thus ought to be subjected to a transitional process of accountability. It is clearly through accountability that we end impunity and prevent the recurrence of similar violations in the future, and there by transform the society in to a new path-the path to democratic and rights upholding system.

The problem however lies in constructing a history that excludes, or at least remains silent about, other actors who were allegedly involved in human rights violations irrespective of the degree of such commissions. Clearly, we can only know the extent of their involvement if they were subjected to investigation and accountability processes. It appears improper to rule out from the outset that their involvement was insignificant or minimal without conducting proper investigation. The protection of human rights requires accountability with respect to all violations.

We have seen above that there are versions of history that reveal that different political groups were involved in human rights violations while fighting the Dergue or each other. Irrespective of who was on the offensive or defensive, and who had just cause or not for the armed conflict, there were (still are) allegations that opposition political groups were involved in human rights violations. This version of the history of violence and human rights violation was not taken into consideration in the formulation of the transitional process. The law establishing the SPO empowered the latter to conduct investigation and prosecution in relation to human rights violations committed by the Dergue and its associates. By so doing, the law excluded (seemingly deliberately but at least through silence) the opposition political groups from the transitional process of accountability. Thus, the transition’s articulation of the history of past violations was not comprehensive enough,¹⁶² and the main mechanism of accountability, i.e., criminal prosecution, was directed against the Dergue only. The transition’s construction of history presents the Dergue as the only perpetrator of human

¹⁶⁰KISSI, E, Above n 31 at 110

¹⁶¹KISSI, E, Above n 31 at 110

¹⁶²There is an on-going debate whether such selective prosecution was appropriate. As extensively discussed in chapter five, some members of the Ethiopian society consider the exclusion of other political parties, especially the EPRP, as partial and unacceptable.

rights violation; and portrays opposition political groups like “the EPRP and Me’ison as victims only and not as perpetrators too”.¹⁶³ However, it has been shown based on historical accounts that this articulation of history is questionable and controversial. This conclusion is compatible with and provides supportive evidence for the assertion that “in all cases of transition from a repressive regime to a non-authoritarian system, the interpretation of history has been an important and disputed subject”.¹⁶⁴ The history of violation as presented by the Ethiopian transition was particularly problematic in light of the complex context of violations.

As Alexander De Wal notes “there is no impartial history of Ethiopia; every presentation of historical facts is laden with modern day political implications”.¹⁶⁵ What are the implications of this inadequacy of the transitional process?

Although, the implications of such problematic articulation will be discussed in the following chapters, it is useful to state certain points now. First, we might question the appropriateness or legitimacy of the transitional process because it did not cover all violations and all perpetrators. The exclusion of some political groups from the transitional process of accountability is the subject of debate in Ethiopia.¹⁶⁶ Transitional process of accountability should be non-discriminatory in the sense that “all parties be treated justly irrespective of the side they come from.”¹⁶⁷ In other words, the definition of violations and perpetrators should be provided in a politically neutral way. It is true that the different groups were opposing and fighting a repressive regime. Again, it is true that without the determination and sacrifice of these groups Ethiopians would have remained under the repressive regime at least for a longer time. Nevertheless, so far as the objective is to address past violations, the reason why some groups were excluded from the process remains a question. Can just cause exclude one from liability? The South African experience tells us that all parties be treated in the same way. The African National Congress (ANC) had ‘just cause’ in fighting apartheid. Nevertheless, this ‘just cause’ did not release ANC from investigation and the process of accountability. As already indicated, South Africa opted for a process of truth and reconciliation by adopting a Truth and Reconciliation Commission with a mandate to

¹⁶³TRONVOLL, K, Above n 30 at 90-91

¹⁶⁴TRONVOLL, K, Above n 30 at 94

¹⁶⁵DE WAL, A, Above n 30 at 19

¹⁶⁶A detailed presentation of these debates is provided in chapter five.

¹⁶⁷SOOKA, Y. June 2006. Dealing with the past and transitional justice; Building Peace through accountability. *International Review of the Red Cross*. ,88 (862), at 313.

investigate violence and human rights violations during Apartheid. Moreover, the investigative mandate was comprehensive; the Commission investigated violations not only by the previous government but also of the different freedom groups such as the ANC, PAC [Pan-African Congress], and AWP [Afrikaner Weerstand Beweging or Afrikaner Resistance Movement].¹⁶⁸ The Commission investigated and came up with a finding that these liberation movements were partly involved in the long and complex history of violations during Apartheid.¹⁶⁹ Ethiopia had a similar experience in the sense that we had complex and “overlapping conflicts” which resulted in massive violations of human rights over a long period. In light of this, the exclusion of opposition political groups from the transitional process gives rise to questions regarding the extent to which the Ethiopian process adequately addressed its history of violence and violations.

The second implication is that the narrow construction of violations and perpetrators may compromise the stated objectives/purposes of the transitional process of accountability. These objectives - fighting impunity, rendering justice and establishing the truth about the past – cannot fully be achieved if some categories of actors, like the EPRP, are excluded from the process of accountability. It may even lead to contrary interpretations of the process, including the perception of victor’s justice and partiality, which undermines both the rendering of justice and the establishment of truth. As will be discussed in chapter five and six, some respondents noted that there could not be justice and truth while being partial at the same time.

Thirdly and finally, these defects may even hinder the full transition to democracy, rule of law, and human rights respecting system. This is because the building of trust and confidence to transform a divided society requires a comprehensive depiction of past violations and the responses thereto. As far as this is not done, building trust and confidence, and healing past wounds would be difficult thereby hindering the possibility for a full transition. It is a common observation in Ethiopia to see currently active political groups accusing each other of unsettled accounts for their participation in the human rights violations of the 1970s and 1980s. There appears to be obvious mistrust and a lack of confidence between the different political groups giving rise to tensions and confrontations, sometimes

¹⁶⁸WILLEMIEN DU PLESSIS, *The South African Truth and Reconciliation Commission: ‘The Truth Set You Free’* in MARIE-CLAIRE FOLETS and TRUTZ VON TROTHA(eds.), *Healing the Wounds, Essays on the Reconstruction of Societies after War*, Hart Publishing, Oxford and Portland Oregon, 2004, at 170.

¹⁶⁹For details see FOLETS and VON TROTHA, Above n 168, at 81

involving violence.¹⁷⁰ Arguably, this mistrust and lack of confidence is partly the result of the problems in the articulation of our history and the responses thereof.

2.5 Concluding Remarks

The fall of the military regime of Mengistu Haile-mariam had created an opportunity for a transition from a repressive regime to democracy, the rule of law, and a human rights respecting system. The need to address past violations led to the creation of a new law enforcement organ with the special mandate to investigate and prosecute human rights violations committed by the Dergue and its affiliate institutions. The terms of reference for the Special Prosecution Office are a manifestation of the transition's articulation of past abuses. The official narration of history was clear. The perpetrator was the Dergue, and thus only violations committed by the same were subjected to the transitional process. However, it is shown that there are other alternative accounts of past violations and their perpetrators, which were ignored by the transition. The inadequacy of the transition's articulation is not that it depicts the Dergue as a perpetrator; rather it is that it excludes others from the definition and thereby from the transitional process of accountability. This problem has, as will be shown in chapters five and six, implication on the legitimacy of the process as well as its effectiveness in bringing about a full transition to democracy, rule of law and human rights respecting system.

The next chapter presents a critical examination of the meaning and significance as well as the main issues of transitional justice, which provide the key elements for the analysis of the Ethiopian transitional justice process.

¹⁷⁰ Again, detailed discussion is presented in chapter six.

CHAPTER THREE: TRANSITIONAL JUSTICE IN GENERAL

3.1 Introduction

This chapter provides a general discussion of transitional justice. It attempts to explain the meaning and historical development of transitional justice. In addition, some experiences across the world are touched upon to show how different societies have dealt with past violations/violence. The objective here is to introduce the meaning and historical evolution of the concept of transitional justice, its goals or main components as well as to highlight the practical varieties of transitional justice processes in responding to past violations. This chapter also provides a more general theoretical discussion of transitional justice processes including the levels of, and parties to, transitional justice, the issue of how to frame transitional processes as well as questions of legitimacy. A more focused analytical discussion of the main components of transitional justice (justice, truth, reparation, and reconciliation) will follow in the next chapter.

This chapter has three sections. The first section briefly deals with the meaning and objectives of transitional justice. The second section considers transitional justice from an historical perspective and discusses various experiences of transitional justice processes. The last section deals with a general theoretical discussion of some common issues in transitional justice processes including the levels, parties to, framework and legitimacy of these processes.

3.2 The Meaning and Objectives of Transitional Justice

At the time of transition from repression and violence towards democracy, the rule of law and peace, societies need to deal with their past. Arguably, the manner of dealing with the past will affect a society's transition to sustainable peace and stability as well as rule of law and

democracy.¹⁷¹ In order to promote justice, peace and reconciliation, government officials and non-government advocates are likely to consider both judicial and non-judicial responses to violations of international human rights law and international humanitarian law.¹⁷² Transitional justice generally refers to these diverse processes and mechanisms of responding to past abuses.

The concept of transition and transitional justice is not without contestations. However, the term has been used to “... refer to the various processes accompanying political transition by societies emerging from a period of violence that aim to deal with the serious human rights violations committed during the conflict or to achieve national reconciliation.”¹⁷³ However, achieving reconciliation is not the only purpose of transitional justice. The United Nations uses the term transitional justice in a broader sense as comprising:

“ the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, reparations, truth seeking, institutional reforms, vetting and dismissals, or a combination thereof.”¹⁷⁴

Thus, transitional justice is a notion that comprises different responses to past abuses. These responses may have various goals/objectives. It is indeed commented that “ a state may have a number of objectives in responding to past abuses: to punish perpetrators, establish the truth, repair or address damages, pay respect to victims, and prevent further abuses.”¹⁷⁵ Again, “there may be other aims as well, such as promoting national reconciliation and reducing conflict over the past, or highlighting the new government’s concern for human

¹⁷¹SARKIN, J. 2000. Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s approach in the New Millennium of Using Community-Based Gacaca Tribunals to Deal with the Past. *International Law Forum*, P. 112. Transition is presented as “ the interval between one political regime and another.” See Guillermo O’ Donnell and Philippe C. Schmitte, *Transitions From Authoritarian Rule; Tentative Conclusions About Uncertain Democracies* 6(1998).

¹⁷²OLSON, LM. June 2006. Provoking the Dragon on the Patio, Matters of Transitional Justice: Penal Repression Vs. Amnesties. *International Review of the Red Cross*, **88**(862), at 276

¹⁷³ ELIZABETH,SG. June 2006. Reflections on the International Humanitarian Law and Transitional Justice: Lessons to be learnt from the Latin American Experience. *International Review of the Red Cross*, **88** (862), at 328

¹⁷⁴ ELIZABETH,SG, Above n 173 citing The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Security Council, S/2004/616, 3 August 2004, at 4.

¹⁷⁵ PRISCILA B HAYNER. 2001. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. Second Edition. New York: Routledge, at 10

rights and therefore gaining the favour of the international community.”¹⁷⁶ However, certain goals/objectives are more common than others in many discussions of transitional justice. These goals of transitional justice may include justice, truth, reparation, reconciliation, or a combination of these.

Transitional justice is assumed to address certain needs/ rights in relation to past abuses. Louis Joinet, Special Rapporteur for the Commission on Human Rights, formulated a “right to know,” a “right to justice,” and a “right to reparations” for victims and interpreted these rights as requiring states to adopt a variety of measures in order to expose the truth, combat impunity and guarantee the non-recurrence of violations.¹⁷⁷ As will be shown, the right to know and the right to justice belong not only to victims (relatives) but also to the public. In addition to these tripartite rights, transitional justice has to address the need for reconciliation. According to Sarkin, transitional justice has to take three goals in to consideration: truth, justice and reconciliation.¹⁷⁸ These rights (needs) are complementary to each other.

The objectives of transitional measures vary depending on the particular situation of each society/state. However, there are certain generally well-known objectives. These objectives include punishing perpetrators, establishing the truth, repairing or addressing the damage caused, paying respect to victims, preventing further abuses, promoting national reconciliation and reducing conflict over the past, highlighting new commitment to human rights and gaining support from international community, establish the rule of law and so on.¹⁷⁹ Among these, four objectives are prominent: Truth, Justice, Reparation and Reconciliation. These objectives are also considered as components of transitional justice, and are sometimes expressed in terms of rights to be fulfilled by transitional processes. These components are discussed in more detail in the next chapter. For the moment, it suffices to keep in mind that transitional justice refers to various processes of dealing with the past with various objectives/goals of which some are more common. It is worth stressing that this study considers the different components as forming part of a broader transitional justice process rather than as separate and competing claims where one may be compelled to choose one goal or mechanism over the other. We should note that justice in transitional societies involves “a plurality of complementary ways of reaching continued stability, peace and

¹⁷⁶ HAYNER, PB, Above n 175 at 10

¹⁷⁷ OLSON, LM, Above n 172 at 282

¹⁷⁸ SARKIN, J, Above n 171 at 115

¹⁷⁹ HAYNER, PB, Above n 175 at 13-14

reconciliation.”¹⁸⁰ In this sense, reconciliation is the culmination or outcome of the proper conduct of truth, justice and reparation processes. This will be elaborated on in the next chapter. The next section provides a brief discussion of the historical development and global experiences of transitional justice in theory and practice.

3.3 Transitional Justice: Historical Development and Practices

Transitional justice has increasingly become a mechanism of addressing past violence and violation of human rights. This general trend is termed as a “revolution in accountability” or as a “justice cascade”.¹⁸¹ Existing studies show an “unprecedented spike in state efforts to address past human rights abuses both domestically and internationally since the mid-1980s”.¹⁸² Teitel traces the history of modern transitional justice to WWI, and presents a three-phase genealogy of transitional justice – the post-WWII phase (the international, ending with the beginning of the Cold War), the post-Cold War Phase (associated with a wave of democratic transitions and modernization), and steady state phase (the normalized law of violence at the end of the 20th Century).¹⁸³ However, some studies on transitional justice trace its history to Ancient Greece, although the ancient forms of transitional justice might be different from the current understanding.¹⁸⁴

This section discusses some cases of transitional justice mechanisms adopted by various societies in transition over a period. Although I do not attempt a comprehensive historical study of transitional justice, a brief discussion of historical events helps us gain a clearer insight into the concept and dynamics of transitional processes. The discussion is offered in two sub-sections- (a) Ancient cases of Transitional Justice and (b) Recent cases of transitional justice.

¹⁸⁰MOBBEK, E. *Transitional Justice in Post-Conflict Societies-Approaches to Reconciliation*. [Online]. [publication detail unknown]. [Accessed on...]. Available from World Wide Web: < http://www.bmlv.pv.at/pdf-pool/publikationen/10_wg12_psm_100.pdf>, at 279

¹⁸¹THOMS, RON and PARIS. April 2008. *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*. Ottawa: University of Ottawa (Centre for International Policy Studies). [Accessed on---]. Available from World Wide Web: <URL>, at 15

¹⁸² THOMS, RON, and PARIS, Above n 181, at 15 citing SIKKINK and WALLING (2007).

¹⁸³ TEITEL, RG. Transitional Justice Genealogy. *Harvard Human Rights Journal*. **16**, at 70-

¹⁸⁴ See ELSTER, J. 2004. *Closing the Books, Transitional Justice in Historical Perspectives*. Cambridge: Cambridge University Press

It is important to state two things at the outset. First, some writings on the history of transitional justice suggest that it may take place not only in the context of a transition towards democracy. It is clear that democracy is just one form of political rule. In the modern era, we have witnessed three forms of political rule, namely, democracy, totalitarianism and authoritarianism.¹⁸⁵ Therefore, a regime change may result in a transition from one form to another. A regime change is also possible without a change in the form of political rule. So, historically transitional processes did take place in the context of various forms of regime change.¹⁸⁶ Second, a regime change may occur because of internal factors (endogenous) or external factors (exogenous) and the transitional process may also be initiated and implemented internally (endogenous) or externally (exogenous). Thus, the historical discussion covers all forms of regime change as well as all forms of transitional process although the focus of my research is the endogenous regime change and with it the endogenous transitional process.

3.3.1 Ancient cases of Transitional Justice

A brief consideration of ancient cases of transitional justice may be useful in understanding its origin as well as how ancient societies have responded to the past in either restoring a democratic system or a monarchy in transitional periods.

Literature on the history of transitional justice suggests that ancient Greece had some form of transitional justice characterized as “democratic transitional justice.”¹⁸⁷ Twice in its long history, the Athenian democracy was overthrown through coups resulting in the establishment of oligarchic regimes. The Athenian transitional justice measures were thus twice undergone in the restoration of democracy (although truncated at first), and these included retributive measures as well as legislative reforms.¹⁸⁸ It may be useful to note that although retribution was the dominant form of justice, it was carried out in the interest of the collective and without retroactive application of law.¹⁸⁹ The second restoration occurred

¹⁸⁵ see ORUN, A.M.2001. *Introduction to Political Sociology*. Fourth Edition. Chicago: University of Illinois, at 95-108

¹⁸⁶ In this sense, the actions taken by the Dergue Revolution against the Imperial regimes could arguably be considered as Transitional Justice.

¹⁸⁷ See ELSTER, J, Above n 184 at 3-23

¹⁸⁸ For more details see ELSTER, J, Above n 184 at 3-23

¹⁸⁹ See ELSTER, J, Above n 184 at 8

through negotiation, and hence the transitional justice measure was the result of compromise, impliedly emphasizing amnesty for reconciliation purposes.¹⁹⁰ Therefore, what was intended in the second restoration was more of reconciliation with little desire for collective retribution, while at the same time undertaking constitutional and legal reforms.

One may say that the main features of transitional justice did exist in the context of the restoration of democracy and the subsequent measures. We had “the wrongdoers, victims, resisters, neutrals and beneficiaries from wrongdoing.”¹⁹¹ Despite obvious differences, the Athenians had taken a number of measures to deal with past regimes that more or less resembles contemporary practices.

Although contemporary understandings associate transitional justice measures to the transition to democracy (successor democratic regime), historical events suggest that it existed even in cases where the successor regime is undemocratic. It has been shown that “transitional justice in the restoration of monarchy had occurred several times in history”¹⁹², including the English Restoration of 1660 and the Restoration of the French Monarchy in 1814 and 1815. These Restorations followed the fall of the monarchy by a revolution that created a regime holding power for a very short period. In France, transitional justice processes took place twice in the restoration of Monarchy.¹⁹³

The most interesting thing about the English and French Restorations is not the specific substantive and procedural matters. Their importance lies in exemplifying cases of transitional justice where the successor regime is not necessarily a democratic one. Here we have only a regime change but not towards democracy. Democracy was not the goal of the transition. The transition was meant to restore a monarchy. Thus, the English and French experience tells us that transitional justice may take place when there is a regime change even if the subsequent regime is not a democratic one.

¹⁹⁰ See ELSTER, J, Above n 184 at 15. Elster states that amnesty against prosecution was used, with some exceptions. It was also noted that both sides had to swear an oath to the effect that they would ‘harbour no grievances’ against each other.

¹⁹¹ ELSTER, J, Above n 184 at 22

¹⁹² ELSTER, J, Above n 184 at 24

¹⁹³ See ELSTER, J, Above n 184 at 3-23. It is commented that although the first restoration was limited to some purges and reparation, the second restoration led to extensive punitive and reparatory measures.

3.3.2 Recent Cases of Transitional Justice

The modern development of the notion of transitional justice is associated with the events of the twentieth century leading towards democracy or at least within the context of a transition to democracy. These developments occurred in different parts of the world with some similarities among these developments in terms of either time or the events leading to their occurrence. These include (a) Western Europe and Japan, (b) Southern Europe, (c) Latin America, (d) Eastern Europe, and (e) Africa. I briefly present some important aspects of transitional justice in these different parts of the world, which enables us to understand how different societies have addressed their pasts.

Western Europe and Japan

The modern history of transitional justice is associated with the events of the twentieth century leading towards democracy. According to Jon Elster, this history starts in 1945 with the defeat of the axis power, namely, Germany, Italy, and Japan.¹⁹⁴ While tracing the history of transitional justice to WWI, Teitel notes that the first phase of the genealogy of transitional justice begins in 1945.¹⁹⁵ It has emerged with vast and complex criminal prosecutions and other measures against former regimes of these countries. It is noted that, in Germany, the trials against Nazi officials begun immediately after the end of the war, and was conducted at both international and national tribunals.¹⁹⁶ In addition, a “vast purge process (denazification)” as well as other measures including legislative ones were undertaken to compensate the victims of the Nazi regime.¹⁹⁷ More or less similar proceedings were conducted with respect to Mussolini’s regime and against Japanese officials.¹⁹⁸ Transitions in these countries were imposed by foreign nations, and are characterized as the Second wave of democratization.¹⁹⁹

¹⁹⁴ELSTER, J, Above n 184 at 54

¹⁹⁵TEITEL, RG. Above n 183 at 72

¹⁹⁶ELSTER, J, Above n 184 at 54. It is noted that these transitional justice processes continue till today

¹⁹⁷see ELSTER, J, Above n 184 at 54-55

¹⁹⁸For detailed discussion see ELSTER, J, Above n 184 at 55-60

¹⁹⁹POSNER, E.A and VERMEULE, A. March 2003. Transitional Justice as Ordinary Justice. *Public Law and Legal Theory Working Paper* (40). Chicago: The University of Chicago, pp.7-8. [Online]. [Accessed on 01 October 2013]. Available from the World Wide Web: <<http://www.uchicago.edu/files/files/40.eap-avp.transition.both.pdf>>

These processes might be seen as transitional justice measures. There is, obviously, an element of justice embodied in international criminal law. The post WWII developments may demonstrate “the triumph of transitional justice within the scheme of international law”.²⁰⁰ However, it appears difficult to assimilate these early cases to more recent understanding of transitional justice. The Nazi officials were tried for committing war crimes, genocide and crimes against humanity in the context of the Second World War, essentially with respect to the situations of an international armed conflict. They were not tried mainly for what they did internally, meaning within the boundaries of their nation/state.²⁰¹ It is also clear that the framework for their prosecution was laid down by the victorious powers (or by the “international community”), and there is no indication of an internal demand for or participation in bringing former regimes of these countries to justice. It is not an endogenous process because both the regime change and the transitional process that followed were brought about by external powers. Above all, these transitional justice processes were shaped by the post-war period conditions and were limited; nonetheless, they have significant contribution for the development of human rights norms and ensuring accountability.²⁰²

Southern Europe

The modern history of transitional justice is also associated with the events in Southern Europe. After the transitions following WWII, the other set of democratic transitions occurred in mid-1970th following the end of dictatorial regimes in Portugal, Greece, and Spain.²⁰³ While the opposition in Portugal and Greece imposed the transitional processes, the one in Spain was led by the elites of the old regime (particularly by King Juan Carlos) following the death of General Franco.²⁰⁴ There are similarities and variations regarding the measures taken following these transitions. In the post 1974 coup, a mix of purges and counter-purges, jail, exile, nationalization and compensation took place in Portugal.²⁰⁵ After the fall of the military regime in Greece in 1974, the new regime had taken ‘dejuntafication’

²⁰⁰TEITEL, RG, Above n 183 at 70

²⁰¹However, the holocaust can be considered as an internal violence-giving rise to accountability.

²⁰²See TEITEL, RG, Above n 183 at 72-. Teitel provides detailed discussion on the contribution and limitation of these transitional justice processes.

²⁰³ELSTER, J, Above n 184 at 60

²⁰⁴POSNER, E.A and VERMEULE, Above n 199 at 7

²⁰⁵For details see ELSTER, J, Above n 184 at 60-61

measures; purged people associated with the military regime, and instituted criminal proceedings.²⁰⁶

The Spanish transition had a peculiar feature “involving a deliberate and consensual decision to abstain from transitional justice [not to address the past].”²⁰⁷ Even if some measures of lustration seem to have taken place, it was only temporary. The decision to not address the past was summarized as follows:

In July 1976, the government declared a partial amnesty that freed approximately four hundred political prisoners. Next, [t]he Amnesty Law of October 1977, one of the first political measures approved by the new democratic government with the support of parliamentary majority, achieved two things. First, most political prisoners were released, including persons accused of blood crimes. Second a ‘full stop’ was approved to prevent the trial of members of the outgoing regime.”

The law also allowed government employees to regain their posts and benefits and led to the closing up of the archives of the secrete police.²⁰⁸ So, one can see the far-reaching consequence of the amnesty laws.

It is worth noting that the Spanish amnesty law is very different from other later amnesties like the Chilean amnesty law of 1978. While the latter is a ‘self amnesty’ by the outgoing military regime and has been challenged and finally reversed, the Spanish amnesty law was passed by an incoming regime and remained in force. As some have suggested, “the best way to move forward [in the Spanish case] is to bury the past, that digging up such horrific details and pointing out the guilty will only bring more pain and further divide a country.”²⁰⁹ It suggests the possibility that “a society [can] build a democratic future on a foundation of blind, denied, or forgotten history.”²¹⁰ It can be argued, “the [Spanish] law was part of a broader transitional pact, which also included the legalization of the Communist Party and the

²⁰⁶ELSTER, J, Above n 184 at 61; It is also claimed that the purge was later partially cancelled; there was also no compensation for victims.

²⁰⁷ELSTER, J, Above n 184 at 61

²⁰⁸ELSTER, J, Above n 184 at 62

²⁰⁹HAYNER, PB, Above n 175 at p. 5

²¹⁰HAYNER, PB, Above n 175 at p. 5

consensual adoption of a new constitution.”²¹¹ This is a general non-remembering of the past, and perhaps seems to have led to an inclusive political system, and a consensus on the reconstruction of a better future. This point may be relevant to the Ethiopian transitional justice process, where as will be shown partial remembering was adopted. It might be argued that non-remembering is better than partial and selective remembering.

Nevertheless, because amnesties encourage impunity, it is considered as a refutation of justice, and only a handful of scholars defend it as acceptable in a restricted and qualified way and when the public supports such.²¹² Even in such cases, it is argued that other complimentary measures be used to ‘address the rights of victims’, which in most cases is missing, and thus giving rise to the rejection of amnesties by supporters of transitional justice.²¹³ There has a growing social movement that challenges the amnesty law of 1977, and there is a need to break decades of silence.²¹⁴ A Spanish judge was suspended in May 2010 by Spain’s General Judicial Committee and investigated (though discontinued) for trying to investigate past abuses on grounds of exceeding his power by bypassing the Amnesty law of 1977.²¹⁵ These recent developments demonstrate that the debate about past atrocities continues, and that past atrocities are not forgotten, even if they were desired to be so.

Latin America

Latin American countries experienced transitions in Argentina, Bolivia, Brazil, Chile, Mexico and Uruguay. In most of these countries, various transitional measures were taken against former regimes. These measures ranged from criminal trials, to the establishment of institutions for uncovering the truth about the past violations to compensation to victims. In Argentina, after the fall of the military regime and the election of President Raul Alfonsin, criminal prosecutions were initially adopted. The Argentine military leaders were prosecuted,

²¹¹ELSTER, J, Above n 184 at 62. However, “ in 2002, claims for reparation were “ being prepared on behalf of over 250,000 Spanish Republican prisoners employed as forced labourers” during the civil war.” (Eizenstat, (2003), at 351) as cited in Jon Elster, at 62

²¹²THOMS, RON and PARIS, Above n 181, at 25. Malinder (2007) and Roht-Arriaza (2006) are considered as two scholars that view amnesties more generously. Some discussion on amnesties is further provided in chapter 4 of this research.

²¹³THOMS, RON and PARIS, Above n 181, at 25

²¹⁴NAVARRO, V. December 2008. *The Case of Spain: A Forgotten Genocide*[Online]. [Accessed on 02 October 2013]. Available from the World Wide Web:<<http://www.vnarro.org/?p=606>>

²¹⁵Human Rights Watch, *Spain: End for Amnesty for Franco Era Atrocities*, 19 March 2010[Online]. [Accessed on 02 October 2013]. Available from the World Wide Web:< http://www.hrw.org/news/2010/03/19/Spain_end-amnesty-franco-era-atrocities>. According to this source, the Human Rights Watch was calling on Spanish government to end the amnesty law.

convicted and punished for the crimes they committed during the ‘dirty war’ of the 1970th and 80th.²¹⁶ The granting of pardon or amnesty was introduced at a later stage due to persistent opposition to the process from the army and other groups.²¹⁷ In addition, a ten member National Commission on the Disappeared (often referred to by its acronym in Spanish, CONADEP) was established through a presidential decree to uncover the truth regarding the disappeared.²¹⁸

In some cases, like Chile, there were amnesties providing immunity from prosecution. In Chile, in 1978, General Pinochet then president of Chile instituted an amnesty law, which barred prosecution for almost all human rights crimes that had occurred since the coup of September 1973.²¹⁹ Confronted with this, an eight member National Commission on Truth and Reconciliation was established through a presidential decree by the elected president Patricio Aylwin.²²⁰ In 1992, law established a compensation policy.²²¹ In contrast to the Argentine case, Chile has moved progressively towards prosecution, initially through a restrictive interpretation of the amnesty law based on what is called the Aylwin doctrine, and finally with the overturn of the amnesty law by the Chilean Supreme Court in 1999.²²² Differently, there was a deliberate exclusion of transitional justice in Uruguay.²²³ As noted by Lewis, “the people of Uruguay voted in a referendum to maintain an amnesty law designed to protect their armed forces from prosecution.”²²⁴ The following statement may summarize the transitional justice processes in Latin American Countries:

The transitions were mostly negotiated by outgoing military regimes, which tried, often successfully, to ensure immunity for themselves. Some of the new democracies established truth commissions that would identify the victims, usually without naming the wrongdoers. Some countries undertook compensation to victims based on the

²¹⁶ SEGAL, R L. 1998. Transitional Justice: A Decade of Debate and Experience. *Human Rights Quarterly*. **20**, at 432

²¹⁷ SEGAL, R L, Above n 216 at 432

²¹⁸ HAYNER, PB, Above n 175 at 33

²¹⁹ HAYNER, PB, Above n 175 at 35

²²⁰ ELSTER, J, Above n 184 at 65

²²¹ ELSTER, J, Above n 184 at 65

²²² HAYNER, PB, Above n 175 at 33

²²³ ELSTER, J, Above n 184 at 71

²²⁴ SEGAL, R L, Above n 216 at 432

information produced by these commissions. In several countries the situation is still fluid, and amnesties may well be overturned or circumvented.²²⁵

Eastern Europe

The transitions to democracy in Eastern Europe begun in the late 1980th following the fall of communism:

“in the spring of 1989, Round Table Talks and subsequent elections in Poland triggered a domino process of transition to (more or less) democratic regime. In chronological order, the transitions took place in Poland, Hungary, East Germany (GDR), Czechoslovakia, Romania, and Bulgaria”²²⁶

These transitions were generally referred to as post-communist transitions in Europe, and witnessed some form of transition to democracy.²²⁷ These transitional justice processes are characterized as post-Cold War transitional justice.²²⁸ These post-communist transitions adopted criminal trials as a response to past abuses; however, these trials were very limited. The case of East Germany is different in the sense that the regime change in question came because of unification. Nevertheless, various transitional process measures were taken to deal with what happened in East Germany. In this respect, Timothy Garton Ash observed that “Germany has had trials and purges and truth commissions and has systematically opened the secret police files to each and every individual who wants to know what was done to him or her-or what he or she did to others.”²²⁹ One can see a combination of measures adopted in post unification Germany.

In Eastern Europe, post communist transitional measures of varying magnitude were adopted, including purges and reparation/restitution.²³⁰ There were also cases of amnesty, for example in the case of Poland.²³¹ Of interest here is that in post communist Eastern Europe, we

²²⁵ ELSTER, J, Above n 184 at 62. In fact some countries like Chile have later on overturned the amnesty and tried former leaders

²²⁶ ELSTER, J, Above n 184 at 66. He indicates that he heavily relied on research assistance by Monika Napela.

²²⁷ ELSTER, J, Above n 184 at 66

²²⁸ TEITEL, RG, Above n 183 at 75

²²⁹ SEGAL, R L, Above n 216 at 432 citing TIMOTHY GARTON ASH, 1997, *The File: A Personal History*; at 220.

²³⁰ ELSTER, J, Above n 184 at 67-70.

²³¹ ELSTER, J, Above n 184 at 72

witness reparations and purges as the main method of dealing with the past, with more amnesties and less prosecutions. Whether reparation and purges effectively addressed the past in these societies remains a question with no clear answer.

Africa

African countries also undertook transitional justice processes following regime changes; Rhodesia (1979), South Africa (1994), and Ethiopia (1991) are significant examples. According to Jon Elster, in both Rhodesia and South Africa, “white economic elite remained after transition, which was largely shaped to safeguard their interests.”²³² The Rhodesians (Zimbabwean) just ignored the issue of dealing with past violations and injustices except for the adoption of some framework for voluntary redistribution of land.²³³ Like Spain and Uruguay, Rhodesia has deliberately refrained from undertaking transitional justice process.²³⁴ Truth commission were established in Nigeria and Sierra Leone.²³⁵ In Rwanda, we clearly see both supranational and national transitional processes. Rwanda also exhibits a unique process of combining informal/traditional processes, the *gacaca* courts, with the formal criminal processes-international and national.²³⁶ Sierra Leone combines criminal prosecutions and truth commissions.²³⁷

A little more could be usefully said about the South African transitional measures. South Africa established the Truth and Reconciliation Commission to deal with its past. In fact, the Commission itself was established because of negotiation that aimed at ending violence and creating a democratic system [negotiated transition].²³⁸ The South African mechanism has its unique features because it aimed at establishing the truth about the past and serving as a mechanism for reconciliation. For this purpose, it also offered an amnesty for alleged perpetrators as an incentive to appear before the Commission and tell the truth. According to Hayner, “only in South Africa has a truth commission been given amnesty granting powers.”²³⁹ The crimes to be subjected to the process before the Commission were those

²³² ELSTER, J, Above n 184 at 70

²³³ We should keep in mind the relatively recent developments in Zimbabwe of forced redistribution of land by the Mugabe government, and the controversies that followed.

²³⁴ ELSTER, J, Above n 184 at 71

²³⁵ see HAYNER, PB, Above n 175 at 69-71

²³⁶ MOBBEK, E, Above n 180 at 278

²³⁷ MOBBEKE, Above n 180 at 278

²³⁸ ELSTER, J, Above n 184 at 71

²³⁹ HAYNER, PB, Above n 175 at 98

committed between 1960 and 1993.²⁴⁰ The processes and conditions for granting amnesty are summarized as follows:

Amnesty (immunity to criminal and civil proceedings) would be granted to applicants who could show that their actions had been (i) motivated by political goals rather than malice or desire for gain, and (ii) proportional to the occasion that triggered them.” The applicant would also have to provide full information about the crime, including evidence about the chain of command.²⁴¹

Through the process of amnesty-for-truth deal and the inclusion of reparation and reconciliation, the South African Truth and Reconciliation Commission offered a unique forum for dealing with the past. As Hayner observed the full disclosure of the truth and the proof of the political motivation of the crimes are cumulative conditions for the granting of amnesty.²⁴² If granted, amnesty exonerates the individual from criminal and civil liability in respect of the acts applied for.²⁴³

However, the existence of truth commission or proceedings before it never prevented prosecutions. Clearly, “prosecutions for past atrocities continued even as the commission was under way.”²⁴⁴ Nevertheless, in some cases, there was some tension between the work of the commission and that of the prosecution office as some of the prosecuted/named for prosecution applied for amnesty according to the commission’s procedure.

Generally, the various experiences discussed in this section demonstrate that societies may adopt various processes of transitional justice in responding to their past. These choices might depend on the prevailing social, economic, political and other factors. Amnesty laws are one such challenge. In the Ethiopian context, although the Dergue did not issue new amnesty laws; the issue of amnesty or pardon was an important issue raised by some defendants during the prosecution process. The idea of non-remembering is also relevant to Ethiopia as the SPO establishment proclamation appears to contain partial or selective remembering as discussed in chapter two. The truth and reconciliation processes of South Africa are

²⁴⁰ SEGAL, R L, Above n 216 at 432

²⁴¹ ELSTER, J, Above n 184 at 27

²⁴² HAYNER, PB, Above n 175 at 99

²⁴³ HAYNER, PB, Above n 175 at 99. Such amnesty also exempts “the state from any liability that might flow from acts committed by those persons granted amnesty.”

²⁴⁴ HAYNER, PB, Above n 175 at 99

indicative of the significance of truth and reconciliation to societies in transition including Ethiopia. It demonstrates that the idea of justice may not be limited to criminal prosecution alone. The various experiences also suggest that the existence of some transitional justice process does not necessarily imply transition to a democratic and a rights-respecting system. They also show issues of responding to the past never die away. The Spanish case is a significant example. To conclude, these experiences provide the key issues for the consideration of the Ethiopian transitional justice process, which is criminal prosecution.

3.4 Some General Issues of Transitional Justice Processes

As indicated earlier, transitional justice is a generic name that refers to the various policies and measures adopted by societies in transition in confronting past abuses. It may take the form of criminal prosecution, truth and reconciliation, purges, lustration, compensation, restitution or any other form. While the different components of transitional justice will be discussed in the next chapter, it is useful to deal with some general issues related to transitional processes. Thus, this section deals with the levels and parties to transitional justice, the manner and challenges of making transitional justice decisions and the legitimacy of transitional processes. A consideration of these issues is essential for an evaluation of the transitional justice process in Ethiopia, which follows in the subsequent chapters of this dissertation.

3.4.1 Levels of Transitional Justice

Transitional justice usually refers to measures and processes adopted at the national-state level, and thus most of the transitional processes adopted so far have operated at the national/domestic state level. This notwithstanding, some authors have identified four levels of transitional justice: supranational institutions, nation-states, corporate actors, and individuals.²⁴⁵ We now, thus, briefly discuss these levels of transitional justice because this might help to understand the policy options available in post conflict or post-authoritarian situations to deal with the past violations.

²⁴⁵ ELSTER, J, Above n 184 at 93

Examples of supranational institutions include the Nuremberg War Crimes Tribunal, the International War Crimes Tribunal for the Far East, and the International Criminal Tribunals for Rwanda and for the Former Yugoslavia.²⁴⁶ There have also been numerous ad hoc international tribunals established by the United Nations since 1990th. The permanent International Criminal Court has also started operation dealing with certain crimes that may be prosecuted after situations of regime change/transition. However, criminal prosecutions before international tribunals are very limited²⁴⁷. Nonetheless, we may ask whether this tendency will change through the establishment and operation of the International Criminal Court (ICC).

Transitional justice may also take place at the corporate level. The word corporate does not necessarily refer solely to business or economic organizations. It may refer also to non-state entities including political institutions (parties), religious institutions, economic entities, political associations and municipalities.²⁴⁸ Sometimes, these institutions can be subjects of transitional justice as they might have participated in past crimes or benefited from violent pasts.²⁴⁹ In some cases corporate actors were dealt with because of the benefit, they derived from the past regime for example by taking possession of property confiscated from other individuals or institutions.²⁵⁰ They may also be considered as “dispensers of justice.”²⁵¹ There were cases where corporate actors and private firms have taken some measures against their members or employees for their participation in or collaboration with past regime.²⁵²

Transitional justice may also take place at an individual level. This is referred to as “private justice” exercised by individuals against others.²⁵³ It can take the form of extralegal killing, deliberate and public humiliation, and social ostracism.²⁵⁴ However, a question might arise as to the appropriateness of some of these private processes. On the one hand, individual level

²⁴⁶ELSTER, J, Above n 184 at 93

²⁴⁷PRISCILA B H ,Above n 175 at 12

²⁴⁸ELSTER, J, Above n 184 at 94

²⁴⁹ELSTER, J, Above n 184 at 94

²⁵⁰ELSTER, J, Above n 184 at 95 It is noted that “the recent negotiations involving Swiss banks, Italian Insurance Company, and German firms that benefited from Nazi wrongdoings also involved corporate actors rather than individuals.”

²⁵¹ELSTER, J, Above n 184 at 94. In some cases, they were the victim of past regime. For example, they may be demanding the return of property confiscated by the former regime. Such was the case in France (by the French Catholic Church after 1815), Czech, Romania, Poland, Hungary, regarding property confiscated from the church or Jews community. Such demands were met in some of these countries.

²⁵²ELSTER, J, Above n 184 at 96

²⁵³ELSTER, J, Above n 184 at 97

²⁵⁴For details, see ELSTER, J, Above n 184 at 97.

reconciliation may also be considered as private justice. A question can also be raised as to the relationship between private justice and legal justice. It is suggested that private justice may be seen as “a substitute for, or pre-emption of, legal justice.”²⁵⁵ Moreover, “legal actions may conversely be shaped by the perceived need to pre-empt or prevent private justice.”²⁵⁶ However, one can question whether legal justice totally prevents private justice. What if victims feel legal justice is not sufficient?

At this point, one should also consider a very important element in dealing with the past at an individual level – that of forgiveness. Some have defined forgiveness “as a negation or abandonment of vengeance.”²⁵⁷ Forgiveness prevents or minimizes private justice, and benefits all – the aggrieved, wrongdoers and the society as a whole.²⁵⁸ Whatever role forgiveness has as a transitional process, it has to take place at an individual level because only victims have the natural right to forgive and perpetrators to request it. The question that may be asked here is what policy measures at a national level would promote forgiveness.

We might also consider another level of transitional justice, which stands between the state and the individual level; we might regard this as justice at the community or local level. These are measures taken at community or local levels, which are neither, state measures, because they do not fit in the formal state structure, nor an individual action because of the collective nature of the measures. These are also different from so-called corporate or municipality level processes. The *Gacaca courts* of Rwanda may serve as a good example, in respect of which few points can be stated. The *Gacaca courts* had their roots in Rwandan tradition of settling disputes and later reinvented as a distinct quasi-judicial institutions of dealing with Rwanda’s violent past. The following observation highlights the rationale and the uniqueness of these Rwandan courts:

[The *gacaca courts* comprise] a system of community courts nationwide...launched as a direct response to the logistical and other challenges of bringing to justice some 120,000 individuals accused of genocide and held in prolonged detention. Based on traditional practices of

²⁵⁵ ELSTER, J, Above n 184 at 98

²⁵⁶ ELSTER, J, Above n 184 at 98

²⁵⁷ ROMAN DAVID, and SUSANNEY P.CHOI. 2006. *Forgiveness and Transitional Justice in the Czech Republic*, Journal of Conflict Resolution, **50** (3), , Sage publications, at 339

²⁵⁸ DAVID and CHOI, Above n 257 at 339

communal reconciliation, the *gacaca* hearings were officially instituted as an elaborate and sustained exercise of transitional justice in local settings with grass-root participation. As such, *gacaca* represents a mainstay of the Rwandan approach to transitional justice: *gacaca* falls under the jurisdiction of the Rwandan government, the *gacaca* hearings took place in local Rwandan communities and the SNJG comprises exclusively Rwandan staff.²⁵⁹

The mandates of the *gacaca*, apart from achieving justice, extend to the promotion of reconciliation and national unity, and were supervised by the National Service of Gacaca Courts (SNJG).²⁶⁰ These courts were separate from the International Criminal Tribunal for Rwanda (ICTR) and the formal courts of Rwanda. Thus, Rwandan transitional justice context demonstrates the co-existence of different levels of transitional process.

Although the above discussion is helpful to understand transitional justice in a broader sense, I confine myself to transitional justice processes adopted at the state level. The other levels of transitional justice may be regarded relevant as far as they have connection with the framework of transitional justice measures adopted by states. The notion of private justice and community or local level justice processes are relevant to the Ethiopian context because, as will be shown, they are seen as either affecting the formulation of the transitional process or as a complimentary [or even a substitute] process for the formal transitional processes. As shown in chapter five, the initiation of trial process was seen as preventive of private justice or individualized acts of revenge against former leaders.

3.4.2 Parties to Transitional Justice Processes

It is clear that transitional justice does not exist or operate in a vacuum. It can operate within a society affected by past violence. Clearly, members of that society initiate, operate or become accountable to it. Transitional justice intends to address these members of the society in one way or another. So, it becomes essential to identify those persons involved in the transitional justice process. Two groups appear most frequently: wrongdoers/perpetrators and victims. However, some members of the society may not fall into either of these categories -

²⁵⁹FANIE DU TOIT, 2011, *Reconciliation and Transitional Justice: The case of Rwanda's Gacaca Courts*, Institute of Justice and Reconciliation Africa Programme: Occasional Paper 2, South Africa Available at www.ijr.org.za, at 15

²⁶⁰FANIE DU TOIT, 2011, Above n 259, at 15-16

for example, neutrals (bystanders). Generally, the comprehension of the measures and results of transitional justice requires the identification of those involved in the process.²⁶¹

The work of Jon Elster provides a comprehensive and useful framework on this point, which this author adopted for the purpose of this present study. Jon Elster identifies eight categories of persons as parties to transitional justice, which are termed as agents of transitional justice.²⁶² Accordingly, all members of the society may fall in to one or more of these categories. It is also possible for an overlap of these agents in the sense that an individual may fall in more than one category, leading to the identification of *eleven different role combinations*.²⁶³

The relevance of such classification of persons involved in the transitional process needs to be understood in all its complexity. The relevance lays in the extent to which these various groups shape the transitional process as well as the extent to which their demands are properly addressed. It is likely that they have various complex competing and sometime conflicting demands/interests giving rise to complex moral, legal and political issues. The demands of perpetrators or resisters, on the one hand, and that of victims may be contrary. Even when two groups have legitimate interests, it may be not possible to satisfy these demands. Arguably, measures that are responsive to victim's demand may prevent the attainment of overall societal objectives. It is, thus, argued, "fulfilling victims' claims, however morally justified, threatens the political transition."²⁶⁴ This is not an argument that one should not address victims' demands; it is an argument instead that one has to balance the various demands within a society when adopting a transitional measure. Therefore, one way of analyzing a transitional justice process involves the examination of how it defined and addressed the different members of the society. Thus, the understanding of the persons involved in the transitional process might be useful for the study of a transitional process in a particular society. This study emphasizes on two most frequently discussed parties, namely

²⁶¹ ELSTER, J, Above n 184 at 99.

²⁶² ELSTER, J, Above n 184 at 99-116. These agents are :- Wrongdoers-the perpetrators of wrongs on behalf of the autocratic regime and one might also assert on behalf of the opposition, Victims - those who suffered from the wrongdoings, Beneficiaries - those that benefited from the wrongdoing, Helpers - those who tried to alleviate or prevent the wrongdoings while they were taking place, Resisters - those who fought or opposed the wrongdoers while these were still in power, Neutrals - those who were neither wrongdoers, victims, helpers nor resisters, Promoters - organizers and advocates of transitional justice after the transition, and Wreckers of transitional justice - individuals who try to oppose, obstruct, or delay the process. pp, 99-100.

²⁶³ ELSTER, J, Above n 184 at 100

²⁶⁴ DAVID and CHOI, Above n 257 at 339

wrongdoers/perpetrators and victims, and examines whether the Ethiopian transitional justice framework has provided a proper definition thereof.²⁶⁵

3.4.3 Manner and Challenges of Framing Transitional Justice Processes

When societies emerge out of conflict or from the rule of an authoritarian regime, they face enormous social, economic, legal and political problems. A crucial point here is how these problems might be formulated and confronted. In responding to past violations, the society should address questions of importance to the collective as well as its individual members. The understanding of whether and how a society has framed and responded to these questions is essential.²⁶⁶ However, these processes are very challenging in light of the different agents forwarding various and complex needs to new regimes. A discussion of these challenges is useful to the understanding and evaluation of the Ethiopian transitional justice process.

It is suggested that most societies in transition face “conflicting perceptions, demands, hopes, and fears concerning justice, truth, national reconciliation, and the building of more stable democracies.”²⁶⁷ It is clear such perceptions guide many decisions relating to the questions of dealing with past abuses.²⁶⁸ However challenging it may be, the new regime has to make crucial decisions, and whether the decisions are legitimate in answering various demands should be considered in each context. In so doing, there needs to be a general framework for answering the various questions that arise.

The first fundamental and decisive question is whether a society has to address its violent past.²⁶⁹ This relates to the decisions “whether there should be investigations, prosecutions, amnesties, or pardons for particular individuals or crimes.”²⁷⁰ What needs a decision first is not on the choice of modalities. Rather, the first issue is whether one has to deal with the past. The issues regarding mechanisms depend on this first judgement.

²⁶⁵ Although this issue is partly addressed in Chapter 2, we still need to consider people perception of such definition

²⁶⁶ see ELSTER J, Above n 184 at 116. According to Elster, “many of these transitional decisions do not reflect a deliberate choice among alternatives. In negotiated transitions, the outgoing leaders may exclude some options as a condition for handing over power. In other cases, some options emerge only after other solutions have been tried and found wanting.” (p.116)

²⁶⁷ SEGAL, R L, Above n 216 at 433

²⁶⁸ SEGAL, R L, Above n 216 at 433

²⁶⁹ ELSTER, J, Above n 184 at 116

²⁷⁰ SEGAL, R L, Above n 216 at 433

From an historical point of view, there are many instances where societies have decided not to deal with the past (refraining from opening up wounds) for different reasons. Such was experienced in Spain, Brazil, Chile, Uruguay, and former Soviet Union.²⁷¹ The reasons for this may be as follows:

In some, the abstention was endogenous and consensual while in others it is attributed to self-amnesty. Still in others, it was out of fear of how former military regimes might react to prosecution. Still in others, it is due to the lack of any organized demand for justice.²⁷²

It is, however, important to stress two things. The first is that the existence of amnesty does not in itself mean that the society has let the matter be once and for all. The Chilean experience is a clear example of how societies may eventually ignore the amnesty law to give themselves an opportunity to come to terms with their past as their fears of past regimes subside. Secondly, an amnesty may be granted as a mechanism of dealing with the past as in South Africa where it served as an incentive to uncover the truth and promote reconciliation.

If a society decides to deal with past wrongdoing, it has to address various subsequent questions. These include what is to be achieved by confronting the past and how this is to be achieved. The goals may include justice, truth, reparation, reconciliation or a combination of these. These goals may lead to either the institution of criminal proceedings or the establishment of truth finding institutions or both. It is also noted, “several successor regimes have confronted demands that the new regimes adopt ‘lustration’ or screening laws providing non criminal sanctions....”²⁷³ A society may also have to decide “whether to permit civil suits against alleged violators of rights, including torturers and murderers.”²⁷⁴ There are strong and persuasive arguments and counter-arguments in addressing these relatively general issues.²⁷⁵

²⁷¹ ELSTER, J, Above n 184 at 116

²⁷² ELSTER, J, Above n 184 at 116

²⁷³ SEGAL, R L, Above n 216 at 433

²⁷⁴ SEGAL, R L, Above n 216 at 433

²⁷⁵ These arguments will be discussed in the subsequent chapters. For example, we have arguments in support of retributive and punitive courses of actions including criminal prosecution. See SEGAL, R L, Above n 216 and Diane F. Orentlicher. On the other hand, we have strong critics of the punitive/retributive action but support truth commissions. See HAYNER, Above n 175.

Questions that are more specific follow depending on the answers given to the preliminary questions above. For example, an essential decision is required regarding “what and who shall [constitute] wrongdoing and wrongdoers.”²⁷⁶ A specific example is the need to determine the severity of the crime to be prosecuted, which in itself raises a number of questions in light of international law, policy constraints, resources and justice.²⁷⁷

A further question that arises in dealing with the past is the scope of wrongdoing and the wrongdoers to be subjected to the transitional justice process. In certain societies, both the former regime and its oppositions might have possibly committed violence/crime. In this respect, the main question is whether the transitional justice process should address all those who were involved in past violations. In this respect, it is noted that the “delicate question is whether retribution [or truth finding or reparation] shall be *one-sided* or *even-sided* - whether acts of wrongdoing shall include only crimes committed by agents of or collaborators with the former regime, or whether crimes committed by the opposition and its supporters to the regime should also be covered.”²⁷⁸ The question of one-sidedness or even-sidedness cannot be confined to prosecution or punitive measures alone, and relates to all measures of transitional justice including truth finding and reparation.

As long as the purpose of transitional justice is to deal with the past, it is logical and appropriate for the process to be all-inclusive. It would appear difficult to support distinctions being made between categories of wrongdoers.²⁷⁹ The South African experience provides useful lessons. In South Africa, both the former regime and the opposition were subject to the same process of transitional justice. In other words, the law setting up the South African Truth and Reconciliation Commission dealt with members of the opposition or liberation movements and of the state security “in an entirely symmetrical manner.”²⁸⁰ Reportedly, Bishop Desmond Tutu “threatened to resign from the Commission unless the African National Congress formally acknowledged that it, too, was responsible for human rights abuses.”²⁸¹ It is further asserted, “the hearings on Winnie Mandela’s activities made it clear

²⁷⁶ ELSTER, J, Above n 184 at 118

²⁷⁷ See SEGAL, R L, Above n 216 at 433

²⁷⁸ ELSTER, J, Above n 184 at 121

²⁷⁹ The Ethiopian prosecution process is based on the distinction between wrongdoers, because only the Dergue was defined as a wrongdoer/perpetrator, and the justifications for so doing will be evaluated in the later chapters.

²⁸⁰ ELSTER, J, Above n 184 at 121

²⁸¹ ROSENBERG (196), at 62 cited by ELSTER, J, Above n 184 at 121

that the Commission did more than play lip service to this principle.”²⁸² In the run up to the release of the Commission’s report, the ANC was disappointed with the draft report and tried unsuccessfully to get a court order against its publication.²⁸³ The fact that the ANC was fighting the apartheid regime did not exclude it from the Commission’s investigation and publication of its involvement in past crimes. Similar approaches were taken in Argentina’s criminal proceedings and Chile’s Truth and Reconciliation Commission.²⁸⁴ The mandate of the Chilean Commission directed it to investigate “disappearances after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on life of persons carried out by private citizens for political reason.”²⁸⁵ So, the question of even-handedness or otherwise in the transitional process is a crucial one. This question arises regardless of whether a society is aiming at criminal prosecution, truth finding, purges, reparations, reconciliation or a combination thereof.

Purges and compensation measures involve further specific questions. For example, in the case of compensation, it is crucial to identify the loss or suffering that is compensable. In other words, there is a need to decide first what forms of suffering constitute victimhood.²⁸⁶ There are also questions regarding the point of departure in terms of setting the time in compensating past wrongdoing and the mode of compensation.²⁸⁷ The new regime has to make decisions, among others, regarding “whom to try, sanction, and compensate; and how to try, sanction, and compensate.”²⁸⁸ Generally, if new regimes make a decision to confront the past, they face consequent substantive and procedural issues. These issues of substantive and procedural nature range from laying down the general framework of transitional processes to the actual operation of the framework in individual cases. Generally, societies in transition need to address multiple and complex questions in responding (or even not responding) to past violations.

These discussions are useful for the analytical part of this study because the transitional justice process of Ethiopia can be examined in light of the manner of adopting the processes.

²⁸² ELSTER, J, Above n 184 at 121

²⁸³ HAYNER, PB, Above n 175 at 44. On the other hand, the former President F.W.de Klerk successfully sued to block the commission, at least temporarily, from naming him in the report.

²⁸⁴ ELSTER, J, Above n 184 at 121

²⁸⁵ HAYNER, PB, Above n 175 at 36

²⁸⁶ ELSTER, J, Above n 184 at 127

²⁸⁷ ELSTER, J, Above n 184 at 127-129

²⁸⁸ ELSTER, J, Above n 184 at 129

The perception of the incoming regime, public participation, the proper determination of wrongdoers and victims, the idea of one-sidedness or even-sidedness, and timeframe are essential points of evaluation of the Ethiopian transitional justice process, as will be undertaken in Chapters 5 and 6.

3.4.4 Legitimacy of Transitional Justice Processes

Legitimacy is a crucial question in transitional justice processes. Legitimacy relates to the legal, moral or political legitimacy of the decision makers and the decision making process. The central question is on what grounds are transitional justice measures to be justified? This relates to the democratic nature of the transitional framework, and to the question, how this might be established. This point is obviously relevant to the Ethiopian context.

One very important perspective is to consider political legitimacy. The question of building a nation after the fall of the former regime raises a central question as to the legitimacy of the subsequent regime and its institutions and laws. Some writers have tried to address the issue in light of creation of a viable nation-state. A viable nation-state is “one to which all citizens subscribe.”²⁸⁹ According to Weber, “the creation of modern nation-state, as all states, involved the establishment of the *legitimacy* of the rule and of the rulers.”²⁹⁰ The nature of legitimacy is such that both the rulers and the ruled must accept the bonds of authority that tie one group to the other. In the absence of such bonds and acceptance, no form of rule or law can work effectively. Modern analysts, like Jurgen Habermas, emphasize that such bonds must be grounded in a widespread common consensus that depends, in the last instance, on the ability of both the governed and the governors to engage in sustained dialogue and communication about that consensus, and other contemporary analysts have pointed to the massive challenges involved in establishing such legitimacy.²⁹¹ In countries where some groups seek to exercise control over other persons and resources, what is crucial for the group might appear “to be less a matter of securing political legitimacy and more one of establishing the rule of force.”²⁹² Nevertheless, questions of legitimacy are critical in modern day political organization. This is also true of societies in transition and transitional justice

²⁸⁹ ORUN, A.M, Above n 185 at 251

²⁹⁰ WEBER quoted in ORUN, A.M, Above n 185 at 251

²⁹¹ HABERMAS cited ORUN, A.M, Above n 185 at 251

²⁹² ORUN, A.M, Above n 185 at 251-252

processes. Thus, there must be a widespread common consensus regarding the rulers and the rules. The new regime and the transitional process must obtain a widespread acceptance.

As indicated earlier, a transitional society has to make fundamental decisions regarding numerous issues including the setting-out of a general framework of transitional justice processes. In addition, transitional justice process must be participatory and all-inclusive in terms of decision-making. More over, transitional justice measures appear to derive their legitimacy from the will of the people. Although the classical Athenian form of (direct) democracy is not feasible in contemporary societies, there are mechanisms for the expression of the will of the people. The members of the society can express their will through their elected representatives, in the common form of representative democracy, which prevails in present times.

Thus, in some cases, an elected body particularly the parliament makes the decisions regarding transitional justice measures. In the Spanish transition of 1976-78, the granting of amnesty (the decision not to open up the past) followed a deliberation with the approval of a parliamentary majority.²⁹³ Such decisions have their own legitimacy in popular sovereignty (the will of the people) although amnesty laws are increasingly becoming less defensible in the eyes of international criminal law. The institution of full democracy is the basis for the legitimacy of transitional justice processes. The transitional measures in Argentina - including trial and truth commission – took place after the election of a new president.²⁹⁴

In some cases, like, in the first restoration of Athenian democracy, we can have what is called truncated democracy with very limited participation. Whether such limited public participation legitimizes the process is not clear. In some cases, the transitional justice process is itself the product of negotiation between the outgoing regime and the incoming regime. Examples include South Africa and Chile. In such cases, transitional justice processes are either limited or excluded by the negotiation itself leaving little or no room for the successor regime. Here one may question the legitimacy of the negotiation itself. It is not clear whether the participation of different parties in the negotiation may legitimize the process. In South Africa, whilst the Truth and Reconciliation Commission was established by Parliament, the general framework itself was constrained by the negotiation. Therefore, what

²⁹³ see ELSTER, J, Above n 184 at 61 and 116

²⁹⁴ HAYNER, PB, Above n 175 at 33

legitimizes the transitional justice process in negotiated transitions is not clear. In certain cases, full democracy may not be established or restored immediately so that an intermediary successor regime might be instituted before the realisation of full democracy. The Athenian case of truncated democracy is one example. In some cases, various political groups or parties might create an intermediary regime through negotiation, composed of these different political parties. Whether this latter case can be assimilated to truncated democracy is not clear. Nevertheless, what legitimizes the actions of the intermediary successor regime is problematic. As indicated in the preceding chapters, the Ethiopian transitional justice framework was designed by the transitional government, and the legitimacy of the process is the subject of controversy. As the intermediary regime that formulated the transitional justice process in Ethiopia was not an elected one, the issue of legitimacy is relevant to the Ethiopian case, and hence this study will be analyzing the issue of legitimacy in the Ethiopian context.

Concluding Remarks

Transitional justice, we understood, is a post-conflict or post-repression mechanism of addressing past violence and violation of human rights and creating a better future. Although its broader history is independent of a particular form of transition, its contemporary understanding relates to democratic transitions. An overview of its broader history reveals that different societies have adopted various mechanisms of dealing with their past ranging from criminal prosecution, to truth and reconciliation processes to amnesty. Transitional justice processes may operate at different levels (supranational, national, corporate, and individual levels). Although this study focuses on national transitional justice process adopted in Ethiopia, it touches upon private justice and local justice in their relation to the formal transitional justice process. There are various parties to transitional justice, and the proper understanding of these parties/agents is crucial in the effectiveness of the process. Among these actors, this study will in subsequent chapters analyze whether the Ethiopian transitional justice process has properly defined the two most important parties, i.e., wrongdoers/perpetrators and victims. The framing of transitional justice process poses a number of challenging issues including:- (1) whether to address the past, (2) what should be the goal (objective), (3) what modality of transitional justice be adopted to achieve the objective(s), and (4) the scope of past abuse to be addressed as well as the definition of perpetrators and victims (as already mentioned). The latter part raises the issue of one-

sidedness or even-sidedness. In addition, the issue of legitimacy of transitional justice – reflected through public participation – is discussed. This discussion is essential to the analysis of the Ethiopian transitional justice process in the subsequent chapters. However, before dwelling on the Ethiopian transitional justice process, it is useful to first elaborate on the main components of transitional justice, and whether they are incorporated as a goal/objective in the Ethiopian transition. Therefore, the next chapter deals with four main elements, namely justice, truth, reparation, and reconciliation.

CHAPTER FOUR: UNDERSTANDING THE MAIN COMPONENTS OF TRANSITIONAL JUSTICE

4.1 Introduction

As outlined previously, this study tries to evaluate the Ethiopian transitional process in light of the components of transitional justice by particularly focusing on justice, truth, reparation and reconciliation. It considers these components as interconnected elements of transitional justice. For example, a broader understanding of justice may include all the other elements. On the other hand, reconciliation could be considered as a culmination of all the other objectives. With this understanding, this chapter provides a more detailed discussion of these main components in terms of their meaning, significance, relationship and the mechanisms of achieving them. These components are, arguably, essential pre-requisites for a successful transition. Obviously, this study will examine whether the Ethiopian transition has incorporated these components into the transitional process, and the extent to which any of them have been achieved, and the implications thereof.

This chapter has four sections. The first deals with justice as a goal of transitional process of accountability. It covers the controversies surrounding the meaning of justice as well as its different forms, and the factors affecting particular conceptions of justice. It also considers the mechanisms of rendering justice, with an emphasis on criminal prosecution, in light of the modality adopted in the Ethiopian transition. The second section discusses truth as an objective of transitional justice. Although truth can be considered as part of justice, a closer consideration of its meaning, significance as well as the mechanisms of securing it is useful for consequent discussions. The third section deals with reparation while the last section discusses reconciliation. In each, the Ethiopian framework is examined to show whether these components were incorporated or not. The discussion in this chapter is aimed at setting out the key issues that form the basis for the critical analysis of the Ethiopian transition.

4.2 Justice

Justice is as an essential right that a society has to satisfy during transition. According to Louis Joinet, the right to justice is recognized under international law, and belongs not only to individual victims but also to the public.²⁹⁵ International and domestic human rights laws require states to provide remedies in cases of human rights violations. Irrespective of whether there is a legal right to justice, the significance of justice to societies emerging out of repressive regimes would appear to be unquestionable. Justice might be significant for the establishment of rule of law, prevention of similar crimes, and promotion of human rights.²⁹⁶ However, the meaning of, and the mechanism for delivering, justice remain contested issues. The following discussion briefly presents these controversies and the factors affecting certain conceptions of justice.

4.2.1 The concept of Justice and Factors affecting conceptions of Justice

The question ‘what is justice’ has been the subject of intellectual debate from ancient times to the present day. Aristotelian conception of justice relates to the taking of what is due to oneself.²⁹⁷ This notion of justice might include various forms of justice including distributive, compensatory, retributive and restorative justice.²⁹⁸

There are various approaches to the question of ‘what is justice’. For example, there are distinctions between consequentialist and deontological theories of justice. Utilitarianism, for example, offers, “a consequentialist theory of justice, insofar as it assumes that the most just outcome or procedure is whatever results in the greatest happiness of the greatest number”.²⁹⁹

²⁹⁵ OLSOM, LM, Above n 171, at 282

²⁹⁶ See for example TIETEL, RG. 2000. *Transitional Justice*. Oxford and Newyork: Oxford University Press; DIANE F. ORENTLICHER. 1991. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, Yale Law Review, Vol. 100,; HAYNER,PB. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. London:Routledge; HANNAH TSADIK. 2007. Prosecuting the Past...Affecting the Future, A Sida Minor Field Study of the Ethiopian Tansitional Justice Trials, Department of Peace- and Conflict Research, Uppsala University, Summer 2007

²⁹⁷ JONES, WA. Reparations, Restitution, and Transitional Justice. Vanderbilt University, at 3 [Online].

²⁹⁸ See JONES, WA Above n 297 at 2. See also JOST, JT and KAY, AC. *Social Justice, History, Theory, and Research*, (Chapter 30), at 1127-1128. [Online]. Available from the World Wide Web: http://www.psych.nyu.edu/jost/Social%20Justice_%20History,%20Theory,%20&%20Research.pdf

²⁹⁹ JOST, JT and KAY, AC, Above n 298, at 1128. Jeremy Bentham and John Stuart Mill are cited as the main proponents of the utility theory.

Utilitarian conceptions of justice apply the “principles of aggregating and maximizing net benefits minus costs...”³⁰⁰ However; utilitarian conception of justice has been subject to criticism for its failure to admit individual differences.³⁰¹

The deontological approach holds that “ determinations of right and wrong depend not only on the consequences of human action but also on other considerations, including transcendent justice principles...”³⁰² Immanuel Kant, for example, argues that a “categorical imperative exists to act only according to that maxim whereby you can at the same time will that it should be a universal law”.³⁰³ The idea is that there are “universal principles of justice”. However, this notion could be rejected on the ground that the same principles do not necessarily apply in culturally differing societies.³⁰⁴ Thus, there is a debate on whether justice is subjective or objective. Apart from the utilitarian-deontological divide, various other notions of justice avail. And none of them is without criticism.

One notion that has been present from the earliest consideration of justice is the idea of distributive justice, which relates to the question of fair, proper, just distribution of resources.³⁰⁵ This notion of distributive or social justice questions entrenched social, economic, and political systems and thereby demands institutional reform.³⁰⁶

Procedural justice is another notion of justice developed because of the recognition that “justice considerations pertain not merely to the allocation of resources but also to the methods or procedures by which decisions are made at work, in political, in the family, etc”.³⁰⁷ The process of resolving disputes should be “fair and satisfying in themselves”³⁰⁸,

³⁰⁰THOMAS N. 2005. The Problem of Global Justice, *Philosophy and Public Affairs* . 33 (2). Yale Law School: Blackwell Publishing, Inc, at 5. [Online]. Available from the World Wide Web: <http://philosophy.fas.nyu.edu/docs/IO/1172/globaljustice.pdf>. Nigel also provides a discussion on “cosmopolitan and political conceptions” of justice.

³⁰¹THOMAS N, Above n 300 at 5

³⁰²JOST, JT and KAY, AC, Above n 298 at 1128. Kant and Rawls are proponents of this approach.

³⁰³Immanuel Kant, critique of Pure reason, ed. and Transl. Paul Guyer and Allen W. Wood, Cambridge University Press, Cambridge, 1948, cited in JOST, JT and KAY, AC, Above n 298 at 1128.

³⁰⁴JOST, JT and KAY, AC, Above n 298 at 1128

³⁰⁵JOST, JT and KAY, AC, Above n 298 at 1127. Aristotle is among the earliest philosophers to deal with the question. Various theories of distributive justice were developed since then including the Marxian-socialist and liberal-progressive (utilitarianism and deontological) theories. The notions of distributive justice and social justice were sometimes used interchangeably (see, p. 1140)

³⁰⁶JOST, JT and KAY, AC, Above n 298 at 1129

³⁰⁷JOST, JT and KAY, AC, Above n 298 at 1149

³⁰⁸WALKER, LIN, and THIBAUT.1979, Cited in JOST, JT and KAY, AC, Above n 298 at 1149

and involves two main procedural characteristics – process control and decision control.³⁰⁹ Some works provide models of procedural justice elaborating what makes a procedure fair.³¹⁰

Another notion is Interactional (or Informal) justice. One might say, “society does not consist merely of the law or the state: it has also a more informal aspect, composed of cultural institutions, conventions, moral rules and moral sanctions. In order for a society to be fully just, it must be just in its informal as well as its formal aspect”.³¹¹ In such sense, justice relates to the informal interpersonal relationship.³¹²

Another notion of justice is retributive justice that relates to the question what happens in case of acts of injustice. It addresses the issue of “how people who have intentionally committed, morally wrong actions that either directly or indirectly harm others, should be punished for their misdeeds.”³¹³ Punishment is generally justified on two grounds – the utilitarian perspective and the deserts perspective.³¹⁴ Retributive or punitive justice typically involves criminal prosecution and trials. Eirin Mobbek suggests that prosecution is usually associated with western conception of justice where punishment appears to be decisive.³¹⁵ Hence, prosecution is perceived as punitive or retributive. Whatever the justifications and goals of punishment may be, most critics of prosecution do not exclude it from the forms of justice, and rather the argument is that it is not the only form of justice.

Restorative justice is yet another conception of justice. Restorative justice could be understood as a substitute for conventional approaches of dealing with crime through

³⁰⁹ JOST, JT and KAY, AC, Above n 298 at 1149. A process control refers to how much people are allowed to present evidence on their behalf before the decision is made, while decision control refers to whether individuals have any say in the actual rendering of the decision.

³¹⁰ STEVEN L. BLADER and TOM R. TYLER, *A four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*. New York University. [online]. Available from the World Wide Web: <http://www.psy.tcu.edu/justice.pdf>

³¹¹ FRANKENA(1962,p.2) cited by JOST, JT and KAY, AC, Above n 298 at 1142

³¹² JOST, JT and KAY, AC, Above n 298 at 1142

³¹³ Carlsmith and Darley, 2008 cited by JOST, JT and KAY, AC, Above n 298 at 1144

³¹⁴ see for details JOST, JT and KAY, AC, Above n 298 at 1144. “Bentham(1962/1843) argued that punishment to be justified, must serve some utilitarian purpose; that is, it must benefit society overall – making social life better or happier in some important ways.” On the other hand, Kant “argued that punishment was fair insofar as people deserve to be punished for immoral behaviour; punishment ‘balances the scales’”. “From a just deserts perspective such as this, the worse the perpetrator’s actions, the harsher the punishment.” As Kant noted, punishment “should be pronounced over all criminals in proportion to their wickedness (as Cited in Carlsmith, Darley, and Robinson, 2002, p.397)

³¹⁵ MOBBEK,E. Transitional Justice in Post-Conflict Societies - Approaches to Reconciliation. [Online]. Available from the World Wide Web: < http://www.bmlv.pv.at/pdf-pool/publikationen/10_wg12_psm_100.pdf> , at 261. However, there are demands for prosecution in non-western world (the developing world) including South Africa, East Timor, Haiti, Rwanda, Sierra Leone

punishment.³¹⁶ This seems to present restorative justice as a new development. However, ancient societies had ideas and practices of restorative justice, and the notion was rather reintroduced into the contemporary criminal justice debates in the 1970th.³¹⁷ We can understand restorative justice as a process for addressing wrongs by bringing “together an offender, his or her victims, and their respective families and friends to discuss the aftermath of an incident, and the steps that can be taken to repair the harm an offender has done”.³¹⁸ Although there is no consensus as to the definition of restorative justice³¹⁹, it remains as one conception of justice.

More relevant to our present discussion, Professor Charles Villa-Vicencio identifies five different forms of justice in relation to transition, namely, deterrent justice, compensatory justice, rehabilitative justice, justice as an affirmation of human dignity, and justice as exoneration.³²⁰ Although these forms of justice may arguably be categorized under any of the above-discussed conceptions of justice, it is useful to consider what each of these conceptions mean. Deterrent justice aims at discouraging potential violators by presenting the past as a lesson.³²¹ Hence, doing justice in this sense is a warning against potential future perpetrators. The mechanism of achieving this – through prosecution or truth commissions – is another question. Compensatory justice demands that victims be compensated and those who benefit under the former repressive regime contribute to compensation and restitution programs.³²² Obviously, the objective of this form of justice is to compensate victims. However, during transition, the demand on the part of victims may be broader than material

³¹⁶ JOST, JT and KAY, AC, Above n 298 at 1145. The definition of restorative justice is not precise, and the mechanism of securing them varies (p. 1145). (Wenzel, Okimoto, Feather, and Platow, 2008, p. 376 as cited by JOST, JT and KAY, AC, Above n 298 at 1146

³¹⁷ THEO GAVRIELIDS. 2007. *Restorative Justice Theory and Practice: Addressing the Discrepancy*, European Institute for Crime Prevention and Control, Publication Series No.52, Helsinki. [Online]. Available from the World Wide Web: , pp. 20-21.

³¹⁸ ROCHE (2006, p. 217) cited in JOST, JT and KAY, AC, Above n 298 at 1144-45. Thus, rather than relying on a third party to impose a unilateral punishment upon a particular offender, restorative justice programs give the justice process “back to their rightful owners: offenders, victims, and their respective communities”. (WENZEL, OKIMOTO, FEATHER, and PLATOW, 2008, at 376 as cited by JOST, JT and KAY, AC, Above n 298 at 1146

³¹⁹ JOST, JT and KAY, AC, Above n 298 at 1145. See also THEO GAVRIELIDS, Above n 317 at 37. Daly and Immarigeon (1998, 21) noted Restorative justice “may refer to an alternative process for resolving disputes, to alternative sanctioning, or to a distinctively different, new model of criminal justice organized around principles of restoration to victims, offenders and the communities in which they live. It may refer to diversion from formal court processes, to actions taken in parallel with court decisions, and to meetings between offenders and victims at any stage of the criminal process”, cited by Theo, P. 36

³²⁰ CHARLES VILLA-VICENCIO, ‘Why Perpetrators Should Not Always Be Prosecuted’; cited in KADER ASMAL. 2000. Truth, Reconciliation and Justice: The South African Experience in Perspective, *The Modern Law Review*, Blackwell Publishing, 63 (1), p. 12

³²¹ VILLA-VICENCIO Above n 320 cited in ASMAL Above n 320, at 12

³²² VILLA-VICENCIO Above n 320 cited in ASMAL Above n 320, at 12

compensation or restitution; and hence we have a more general notion of reparatory justice. Rehabilitative justice tries to cure the affected character and disposition of both victims and perpetrators.³²³ Rehabilitative justice aims at healing victims' wounds and correcting the character of both victims and perpetrators. It has a restorative dimension. Justice as an affirmation of human dignity stresses on the sameness of humanity and that all human beings have equal dignity.³²⁴ This affirmation of equality in dignity is also essential for social reconstruction. Finally, justice as exoneration corrects past records relating to false accusations.³²⁵ Justice requires the reputation and integrity of the innocent be maintained, and if people were wrongly accused, one shall declare their innocence or exonerate them. We may infer the significance of truth from this form of justice. The existence of these different forms of justice suggest the possibility for the establishment of diverse mechanisms of dealing with the past including the establishment of truth and reconciliation commissions and the adoption of criminal prosecution.

Two important questions therefore should be addressed in relation to the question of justice. The first is what factors lead to the adoption of a certain conception of justice? The second relates to whether transitional justice processes can be evaluated in light of the decision-makers and decision-making process. We now turn to these issues.

What factors affect the formulation of a certain conception of justice? The formulation of a particular conception of justice during transition may depend on the subjective conceptions of the decision makers. We might note that "[i]n deciding how to deal with wrongdoers and victims from the earlier regime, the leaders of the incoming regime are often influenced by their ideas about what is required by justice."³²⁶ The conception of justice of the successor regime is likely to dictate the policy choices and subsequent actions of the transitional process.

Therefore, in order to analyze cases of transitional justice, it is important to understand the conception of justice of the decision makers.³²⁷ Certain key features like impartiality and

³²³ VILLA-VICENCIO Above n 320 cited in ASMAL, Above n 320, at 12

³²⁴ VILLA-VICENCIO Above n 320 cited in ASMAL Above n 320, at 12

³²⁵ VILLA-VICENCIO Above n 320 cited in ASMAL Above n 320, at 12

³²⁶ ELSTER, J. 2004. *Closing the Books, Transitional Justice in Historical Perspectives*. Cambridge: Cambridge University Press, at 80

³²⁷ ELSTER, J, Above n 326 at 80.

universality might help to identify some general notions of justice.³²⁸ However, this explanation seems to be relevant to cases where the former regime has been totally replaced by a new regime, wherein the former leaders have no say on the transitional process. However, many transitions result from negotiations between opposing factions that lead to the ending of conflict situations.

In case of negotiated transitions, different groups may hold different conceptions of justice. In such situations, each of the parties usually presents themselves as struggling for justice.³²⁹ Thus, there is no room for one side to impose its conception of justice, and if peace shall return, some negotiation over justice is necessary. We may note, “in post conflict situations the question of how to see that justice is done is itself usually a matter of political negotiation and compromise as, almost by definition, different sides have different conceptions of what would constitute a just outcome, even if they share an understanding of just principles.”³³⁰ Thus, in post conflict situations or processes leading to end the conflict through peace settlement, we have different subjective conceptions of justice held by different groups participating in the formulation of transitional justice policies. Hence, there is a difficulty of formulating a notion of and a mechanism of guarantying justice that is satisfactory or suitable to the various groups.³³¹ In any case, however challenging it may be and however differing the bargaining powers of the parties are, we can only have a negotiated justice where no one party imposes its conception on the other or others.

Subjective conceptions of justice may emanate from reason, self-interest and emotion.³³² Exactly which of these factors may lead the subject to adopt a particular conception of justice, however, is often difficult to determine with any certainty. An important point relevant to transitional justice is to see the relationship between the subjective conception of justice and actual behaviour. The question here is whether a certain conception of justice will lead the agent to a certain course of action, in other words whether behaviour is the result of

³²⁸ ELSTER, J, Above n 326 at 80. One may identify egalitarian, utilitarian, and rights based conceptions of justice.

³²⁹ PANKHURST, D.1999. Conceptualizing Reconciliation, Justice, and Peace in Issues of Justice and Reconciliation in Complex Political Emergences. *Third Quarterly*. 2(1). Taylor and Francis Ltd., pp. 239-256. [Online]. [Accessed on...]. Available from the World Wide Web:

³³⁰ PANKHURST, D, Above n 329 at 239-256

³³¹ PANKHURST, D, Above n 329 at 239-256

³³² ELSTER, J, Above n 326 at 80

the conception of justice held. The complexity of this relationship is clear from the following statement.

“---we find that subjective conceptions of justice matter little for actual behaviour. They may be mere “Sunday beliefs” that command subjective assent without inducing action to bring about a just state of affairs. In other cases, we may find that the desire to see justice done provides the main explanation of the agent’s behaviour. In still other cases, we may find that justice coexists with other causally efficacious motivations, such as emotions or self-interest, so that the action that is finally taken owes something to each other.”³³³

Thus, a transitional justice process might result not only from the desire to see justice done (reason-based conception of justice) but also from emotion and self-interest.³³⁴ Emotion and self-interest are crucial not only in determining a certain conception of justice but also in determining a certain course of action at times in conflict with the subjectively held conception of justice. These driving forces of behaviour could be referred to as the “tracheotomy of motivations”.³³⁵ These three motivations may influence the entire decisions and outcomes of a transitional justice process.

It is argued that most societies have a “*normative hierarchy of motivations* that induce meta-motivations over first-order motivations.”³³⁶ In light of this hierarchy, actors driven by the least ranked motive are likely to present themselves as acting on higher motivations.³³⁷ Nevertheless, they desire and act based on their actual motives/intentions.³³⁸ Hence, a person who is motivated by self-interest may not want to be seen or judged as such.³³⁹ However, such action is not compatible with deontological view of justice as attaining individual

³³³ ELSTER, J, Above n 326 at 81

³³⁴ For details on the relationship between emotions and justice, see JOSEPH DE RIVERA. 1989. Introduction: Emotions and Justice. *Social Justice Research*, 3 (4). [online].[Accessed on 30 September 2013]. A available from the World Wide Web: <http://links.springer.com/article/10.1007/Bf01048079;accessedon>; SUSANNE KARS TEDT. 2002. *Emotions and Criminal Justice*, Theoretical Criminology, London: Sage Publications. [Online].[Accessed on 30 September 2013]. For De Rivera, “neither attitude nor moral responsibility leads to moral action without emotional involvement.”

³³⁵ ELSTER, J, Above n 326 at 81

³³⁶ ELSTER, J, Above n 326 at 82 It is suggested that “in ancient Greece, for instance, the most valued motive was the desire to promote the good of the *polis*; the second-ranked that of taking revenge on an enemy; the third ranked that of pursuing one’s self-interest; and the least valued that of envy.”

³³⁷ ELSTER, J, Above n 326 at 82

³³⁸ ELSTER, J, Above n 326 at 82

³³⁹ ELSTER, J, Above n 326 at 82

benefit under the pretence of justice is a violation of the categorical imperative.³⁴⁰ Clearly, the justifications forwarded by leaders in formulating transitional processes may not necessarily be the real motivation of their actions. There could be hidden motives. In addition, various mechanisms can be employed to meet the different motivations at the same time.³⁴¹ We might note, “in transitional justice, an emotionally based desire for revenge may in one sense be stronger than the desire to carry out impartial justice.”³⁴² This suggests the difficulty of formulating justice processes based on reason, especially in chaotic times.³⁴³ However, actors who act under the influence of other motivations may appreciate reason for its rank in the hierarchy of motivations and desire to present it as on their part.³⁴⁴ As Seneca said, “Reason wishes the decision that it gives to be just; anger wishes to have the decision which it has given seem the just decision.”³⁴⁵ However, some scholars note that emotion and empathy are important basis of justice.³⁴⁶

The formulation of a transitional justice process may also be influenced by other desires including the desire of new leaders to demonstrate that “We are not like them.”³⁴⁷ Here, the leaders have a motivation based on self-interest to present themselves as different from former leaders. However, the incoming leaders do not declare this as a basis for their action; rather they claim to be serving justice. The incoming leaders might choose to deal with past lawlessness in a lawful manner, and distance themselves from similar lawless practices.³⁴⁸ As a result, the motive to punish or vengefulness may be limited by the desire to be (appear to be) different from past leaders.³⁴⁹ A particular example is one where former leaders have committed some clear wrongs in respect of which the law does not provide punishment. Hence, it is difficult to punish the wrongdoers without adopting retroactive laws, which in itself would amount to the acceptance of past lawlessness.³⁵⁰ This constraint is the result of the principle of legality and non-retroactivity of penal laws. There is no crime or punishment without specific penal law to that effect, and penal laws may not be applied retroactively.

³⁴⁰ JOST, JT and KAY, AC, Above n 298 at 1128

³⁴¹ ELSTER, J, Above n 326 at 82

³⁴² ELSTER, J, Above n 326 at 83

³⁴³ ELSTER, J, Above n 326 at 83

³⁴⁴ ELSTER, J, Above n 326 at 83

³⁴⁵ ELSTER, J, Above n 326 at 83 citing SENECA, *On Anger* I.Viii.

³⁴⁶ See RIVERA, Above n 334. See also MARTIN L. HOFFMAN. 1990. Empathy and Justice Motivation, *Motivation and Emotion*, New York University, 14(2).[online].[Accessed on 30 september 2013]. Available at <http://link.springer.com/article/10.1007/BF00991641>. see also TEDT, Above n 334.

³⁴⁷ ELSTER, J, Above n 326 at 83 citing Havel

³⁴⁸ ELSTER, J, Above n 326 at 83

³⁴⁹ ELSTER, J, Above n 326 at 83

³⁵⁰ ELSTER, J, Above n 326 at 83

The foregoing paragraphs clearly show that the conception of justice and the motivations of action of the actors (mainly the new regime) are useful to understand and evaluate the formulation and implementation of transition justice processes. These points are relevant to this study because the conception of justice and the real motivations for adopting criminal prosecution is a contested issue in Ethiopian transition. The later chapters on analysis of the Ethiopian transition partly reveal the contestations regarding the real motivations of Ethiopian government in formulating and implementing transitional justice process.

Finally, justice may be conceptualized as a continuum, taking different forms-legal justice, administrative justice and political justice - with pure legal justice and pure political justice at the opposite side of the spectrum while administrative justice takes a swinging middle position.³⁵¹ These concepts might be useful to understand and evaluate particular transitional justice processes.

A pure political justice occurs when the executive organ of the new regime alone gives a final decision on who the wrongdoers are and their fate.³⁵² This may take different forms including those actions that bypass, ignore or undermine court decisions, as well as replacing judges for political reasons, and conducting show trials.³⁵³ Political interference with the law or courts may amount to pure political justice. This form of justice lacks procedural fairness. Political justice is a characteristic feature of authoritarian regimes. As observed by Mobbek, “an authoritarian regime is always reflected in its judicial system and by its judiciary.”³⁵⁴

Pure legal justice is associated with court proceedings. Pure legal justice assumes the existence of an impartial and independent judicial system, which acts according to the requirements of due processes of law. A pure legal justice has four characteristic features – clarity of laws, freedom of courts from intervention (judicial independence), impartiality, and

³⁵¹ ELSTER, J, Above n 326 at 84

³⁵² ELSTER, J, Above n 326 at 84. Elster also notes “one might also include the power of the executive to decide the fate of the wrongdoers once they have been designated as guilty by another organ of government.” In 1945, de Gaulle, for instance, used his powers of grace very extensively (Bancaud 2002, p.70)). (P. 84).

³⁵³ ELSTER, J, Above n 326 at 85. However, certain political decisions, like the selection and appointment of judges following proper procedures, may not amount to political interference if officials can subsequently freely follow the law and their conscience. In show trials, “the appearance of legality is a mere fiction because the outcome is a foregone conclusion”. P.85

³⁵⁴ MOBBEK, E, Above n 315 at 274

due process.³⁵⁵ The extent to which these requirements can be fulfilled, especially in transitional societies is questionable. A well functioning judicial system may not be available in transitional societies because of past violations or culture of violence with impunity. In such societies, the judicial system “may have been entirely corrupt, encouraging or supportive of human rights abuse conducted by government agents, or simply close to non-existent.”³⁵⁶ In such context, it is unlikely to have a pure legal justice. Violation of these requirements may occur in any society as stated below:

In law-abiding societies “during normal times,” violations of [these] criteria...are rare. In societies where the rule of law is poorly established or in exceptional circumstances, violations happen more frequently.³⁵⁷

Clearly, the possibility of violation of the requirements of pure legal justice is higher in transitional societies as these are exceptional circumstances. In certain cases, violations of these requirements may be inevitable and tolerable.³⁵⁸ Political justice takes the place of legal justice if many violations occur or if they are fundamental and decisive.³⁵⁹ However, an important question that follows is how to distinguish between violations that are ‘tolerable’ and those that lead to political justice. An essential indicator in this respect is whether the outcome of court proceedings can be predicted with full certainty or not.³⁶⁰

Administrative justice usually refers to the purging or lustration of officials of the former regime. Although often used interchangeably, purge and lustration have some difference. Lustration is the removal of “persons from public employment based on their affiliation with the prior regime.”³⁶¹ Purge refers to the removal of persons from the army and security forces for committing human rights violations.³⁶² However, there is little difference in the sense that both relate to removal of persons associated with the former regime; both are punitive or retributive in their nature. These administrative measures may be closer to political justice or

³⁵⁵ ELSTER, J, Above n 326 at 86. For more on these, see Jon Elster PP.86-88.

³⁵⁶ MOBBEK, E, Above n 315 at 274

³⁵⁷ ELSTER, J, Above n 326 at 88

³⁵⁸ ELSTER, J, Above n 326 at 88

³⁵⁹ ELSTER, J, Above n 326 at 88

³⁶⁰ ELSTER, J, Above n 326 at 88

³⁶¹ HAYNER, PB. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. London: Routledge, at

³⁶² HAYNER, PB, Above n 361.

legal justice depending on different factors, including the presence or absence of appeal.³⁶³ The absence of procedural safeguards to administrative measures may amount to political justice. This seems to be the common practice. One may criticize lustration measures for violating the requirements of due process.³⁶⁴ It is important to keep in mind that borderline cases exist.

The idea of justice as a continuum, briefly discussed above, helps to understand and evaluate the decisions made throughout transitional justice process. The ideas of political justice and legal justice are particularly relevant to this study because it helps to evaluate the various decisions made in the Ethiopian transitional justice process including the determination of who the perpetrators are. As will be shown, in chapters 5 and 6, almost each decision in the criminal justice process remains questioned for its pure political instrumentality.

Generally, we may note that whilst the concept of justice is controversial, societies in transition need nevertheless to articulate some conception of justice as well as mechanisms of achieving it in dealing with past violations. Clearly, the conceptions of justice and justice motivations of the actors have important role in the formulation and implementation of transitional justice processes. It is useful to note that the concept of justice relates to other components of transitional justice processes. A broader concept of justice might include truth and reparation, and it is an essential component of reconciliation processes. Considering a broader notion of justice, one may question whether it can be achieved by adopting one mechanism of transitional justice alone; does justice instead require the adoption of a combination of methods and processes. These issues are the subject of controversy, with increasing understanding of the need for a holistic strategy.

4.2.3 Mechanisms of Rendering Justice: Criminal Prosecutions

This sub-section discusses criminal prosecution as a mechanism of ensuring justice. It discusses the significance of prosecution, whether a duty to prosecute exists under

³⁶³ ELSTER, J, Above n 326 at 92. Administrative justice may be considered as close to legal justice “if sanctions can be appealed to a court.”

³⁶⁴ HAYNER, PB, Above n 361 at 13. It is claimed that these measures are not possible to implement (outside of east Europe) due to lack of record of collaborators, or records are destroyed during the course of transition; and an agreement, in negotiated transitions, that civilian employees of the former regime will not be punished or purged/lustrated.

international law, and some debates as to the appropriateness of prosecution as a mechanism of transitional justice. This discussion is relevant to the analysis of the Ethiopian process as prosecution is the main mechanism adopted to deal with the past.

The dominant understanding of transitional justice relates to the investigation, prosecution and punishment of perpetrators of past abuses.³⁶⁵ Criminal prosecutions were employed, both at national and international level, not only to satisfy the right (need for) justice but also to ensure the rule of law and accountability, prevent the recurrence of similar events, promote reconciliation, disclose the truth about the past, and promote peace and democracy.

As Hayner asserts “the rule of law stands above political decisions; the essence of the rule of law, a cornerstone of democracy, is that no person is exempt from the law.”³⁶⁶ This suggests that the rule of law shall be at the centre of transitional processes, and hence that accountability shall be ensured according to the law. Other political considerations should not override the rule of law. Obviously, societies emerging out of repression were denied the rule of law, and hence the need for the rule of law is more pressing. We might also argue that the rule of law is a basis for building a democratic society that departs from the past. The rule of law also ensures accountability and helps to fight impunity that reigned in the past. Hence, we may argue that societies in transition should uphold the rule of law and deal with their past according to the law, which implies the prosecution of violators. Moreover, this might imply that no reason or process shall negate the rule of law whether the objective in doing so is to promote peace, reconciliation or any other objective. In this sense, justice relates to the apprehension and lawful prosecution of past offenders.

In providing the case for prosecution, Professor Orentlicher notes its effectiveness in deterring similar future violations.³⁶⁷ Orentlicher asserts, “the fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression.”³⁶⁸ However, whether punishment is always effective in deterring future violations or crimes is questionable. Nevertheless, we might argue that punitive method is superior to non-punitive

³⁶⁵TIETEL, RG. 2000. *Transitional Justice*. Oxford and Newyork: Oxford University Press, at 27

³⁶⁶HAYNER,PB, Above n 361 at 278

³⁶⁷DIANE F. ORENTLICHER. 1991. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. *Yale Law Review* . **100**, p. 2542

³⁶⁸ORENTLICHER, Above n 367, at 2542.

one in preventing future violations.³⁶⁹ Criminal prosecution may achieve this purpose by exposing the truth about past violations and reproaching them as well as educating the public not to participate in similar crimes and inspiring societies to reassess their fundamental values and assert the basic principles of the rule of law and human dignity.³⁷⁰ This suggests that the discovery of the truth and the punishment of perpetrators may deter future violations through education and by serving as a warning. Criminal prosecutions and trials might also lead society to break from cycles of violence by reaffirming respect for the rule of law and human dignity. Thus, the argument in support of prosecution depends upon the desirable consequences of the process. The implication is that the failure to prosecute has negative consequences, and these should be avoided. In this respect, it is noted that:

Above all, however, the case for prosecutions turns on the consequences of failing to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future?³⁷¹

This suggests that failure to prosecute has negative consequences or “harmful effects” in the sense that it would perpetuate a history of impunity and violence especially in the context of massive violations, and that such a tendency is not acceptable.³⁷² Hence, “the new political arrangement in the post conflict society...can be legitimized by disallowing impunity and adhering to rule of law principles.”³⁷³ Ruti G. Tietel presents such arguments for criminal justice as follows:

The leading arguments for punishment in periods of political flux is consequentialist and forward looking: It is contended that, in societies with evil legacies moving out of repressive rule, successor trials play a significant foundational role in laying the basis of a new liberal order.³⁷⁴

³⁶⁹MOBBEK, E, Above n 315, at 278. However, “the level of deterrence in trials for human rights abuses” might be questionable. see p.278 of same

³⁷⁰ORENTLICHER, Above n 367, at 2542

³⁷¹ ORENTLICHER, Above n 367, at 2542

³⁷²ORENTLICHER, Above n 367, at 2542. She argues that the harmful effects are compounded when prosecutions are foreclosed by amnesty law. She rejects what she called wholesale amnesty.

³⁷³ HANNAH TSADIK, Above n 296.

³⁷⁴ TIETEL, RG, Above n 365 at 28. Teitel supports what is called ‘limited criminal sanction’.PP.46-51

Thus in transitional societies, punishment has a transformative role, as noted:

Since societies emerging from wide-scale abuses and violence are often characterized by weak institutions...,prosecutions are necessary to build both public confidence in and the institutional capacity of rule of law and the judicial branch.³⁷⁵

This emphasises that prosecution is essential for creating and building capable, reliable and reputable institutions of the rule of law and the justice system in which the public could trust. Therefore, such measures are part of an effort to create a system that departs from the past. In addition, prosecution might also be an essential instrument of transformation to a democratic system.³⁷⁶ While the rule of law is essential to building democracy, amnesty is an antithesis of democracy.³⁷⁷ Thus:

Amnesty may not enable stability, and a stable democracy cannot be built on a weak foundation...A government that begins its term by rejecting the rule of law and accountability undermines its own claims to legitimacy.³⁷⁸

The arguments for prosecutions highlight its multiple desirable outcomes. Professor Diane Orentlicher strongly argues that offenders should be prosecuted because international law requires so and also it best protects rights and values; this calls for the government to prosecute even if it might face some risks for doing so including the risk of military dissatisfaction.³⁷⁹ Similarly, Cherif Bassiouni condemns “any process which would allow political considerations [that] prevents full-scale prosecutions”.³⁸⁰ This position suggests that only through prosecution can we stop impunity, and political or other considerations are mere covers for the continuation of the practice of impunity. This suggests the need for full-scale prosecution. However, as will be shown, full-scale prosecution is in itself problematic.

³⁷⁵ TSADIK,H, Above n 296, at 10

³⁷⁶ ORENTLICHER, Above n 367, at 2453

³⁷⁷ TSADIK,H, Above n 296, at 10

³⁷⁸TSADIK,H, Above n 296, at 10 citing SRIRAN CHANDRA.2003. Revolutions in Accountability:Problems and Prospects of New Legal Approaches to Prosecutions of Past Abuses. *American University International Law Review*.19(2)

³⁷⁹ ASMAL,K, Above n 320, at 6 citing Professor Dianne.

³⁸⁰ ASMAL,K, Above n 320 at 6, citing Cherif Bassiouni, Introduction (1996), Law and Contemporary problems

Looking at these arguments, a question that arises is what the general trend in transitional societies is. Put differently, is prosecution a general trend. Donna Pankhurst, although critical of criminal prosecution, favouring instead truth and reconciliation processes, acknowledges the tendency towards criminal prosecution.³⁸¹ Pankhurst noted that:

Increasingly, war crimes, serious abuses of human rights and crimes against international humanitarian laws are thought to require some sort of punishment for justice to be seen to be done at the end of a conflict, and in order for peace to hold, whether or not reconciliation of any sort takes place. International human rights organizations tend to adopt this position on justice.³⁸²

This arguably holds true in societies emerging out of repressive regime. Criminal prosecution is seen as a useful method of dealing with the past. Thus, “the use of transitional justice trials is not an isolated or marginal practice, but a common one occurring in the bulk of transitional justice countries [referred to as “justice cascade”]”.³⁸³ However, a question might arise whether such prosecutions were conducted as a matter of choice by the society concerned or whether they were obliged to conduct it. This issue should be seen in the context of international law. Therefore, the more specific question relevant here is whether there is a duty to prosecute under international law.

An understanding of the extent to which there is a duty to prosecute under international law, if any, is essential because such a duty would affect the scope of non-prosecutorial options available to states or societies.³⁸⁴ Hence, I will briefly discuss the duty of states under international law to prosecute.

(i) Duty to prosecute under International Humanitarian law

As a matter of general consideration, numerous treaties impose on state parties an obligation to prosecute or extradite persons suspected of committing certain types of crimes; and such

³⁸¹ PANKHURST, D, Above n 329 at 242

³⁸² PANKHURST, D, Above n 329 at 242. He however rejects this as will be seen latter on.

³⁸³ TSADIK, H, Above n 296, at 10

³⁸⁴ OLSON, LM. June 2006. Provoking the Dragon on the Patio, Matters of Transitional Justice: Penal Repression Vs. Amnesties. *International Review of the Red Cross*, **88**(862), at 279

obligation is termed in Latin as *aut dedere aut judicare*.³⁸⁵ It is clearly observed, “there are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice.”³⁸⁶ It has been observed, “a common feature of the different treaties embodying the obligation to extradite or prosecute is that they impose upon states an obligation to ensure the prosecution of the offender either by extraditing the individual to a state that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute.”³⁸⁷ Such an obligation also exists under customary international law.

In international humanitarian law, the duty to prosecute exists both in treaties and in customary international humanitarian law.³⁸⁸ The provisions of the four Geneva Conventions and Additional Protocol I impose on state parties a general duty to repress all acts that contravene the provisions of IHL.³⁸⁹ The Geneva Conventions clearly state that “each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Conventions other than the grave breaches...”³⁹⁰. Although this provision requires states to adopt any measure they think appropriate to discharge their obligation, it does not prescribe criminal prosecution.

Nevertheless, grave breaches of these conventions and Additional Protocol I would give rise to the duty to prosecute.³⁹¹ Thus, clearly, the treaty obligation “*aut dedere aut judicare*” relates only to those war crimes that constitute ‘grave breaches’ of the Geneva Conventions and Additional Protocol I.³⁹² Antonio Cassese underlines that “the obligation of states to prosecute and punish persons accused of serious violations of international humanitarian law through their respective *national* jurisdictions arises out of their treaty obligations, most notably those under the 1949 Geneva Conventions.”³⁹³ Hence, the Conventions and the

³⁸⁵ Miša Zgonec-Rozej and Joanne Foakes, July 2013, *International Criminals: Extradite or Prosecute*, International Law, Chatham House, at 2

³⁸⁶ Miša Zgonec-Rozej and Joanne Foakes, Above n 385 at 3

³⁸⁷ Miša Zgonec-Rozej and Joanne Foakes, Above n 385 at 3

³⁸⁸ See OLSON, Above n 384, ORENTLICHER, Above n 367, TSADIK, H, Above n 296

³⁸⁹ OLSON, Above n 384, at 279

³⁹⁰ See Articles 49(3), 50 (3), 129 (3) and 146 (3) respectively of the four Geneva Conventions, and Article 85 (1) of Additional Protocol I

³⁹¹ OLSON, Above n 384, at 280. The grave breaches specified in Arts. 50, 51, 130 and 147 respectively of the four Geneva Conventions when committed during international armed conflict against persons and property protected by the four Geneva Conventions are war crimes. The grave breaches of Additional Protocol I are defined in Articles 11 (4), and 85(4) and constitute war crimes.

³⁹² Miša Zgonec-Rozej and Joanne Foakes, Above n 385 at 3.

³⁹³ ANTONIO CASSESE. (1998). On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, *European Journal of International Law*, 9(1998) [Online]. Available at www.ejil.org/pdfs/9/1/1477.pdf, at 5.

Protocol have identified these grave breaches among other breaches and imposed a duty on states either to prosecute or to extradite suspects. Grave breaches of the Geneva Conventions give rise to universal jurisdiction in the sense that any state may apprehend and prosecute any person so suspected irrespective of territorial or nationality/personality links. Indeed, international human rights organizations are keen to remind states of their obligations under the Geneva Conventions in this connection, especially in the context of transition.³⁹⁴ In addition to the four Geneva Convention and Additional Protocol I, it could be argued that other IHL treaties also impose similar obligations.³⁹⁵

A crucial issue arises whether states have the duty to prosecute duty under customary international humanitarian law. While the existence of the obligation to extradite or prosecute under treaties is recognized, there are disagreements on whether such an obligation exists under customary international law.³⁹⁶ This debate relates to the two elements of customary international law, i.e. state practice and *opinio juris*. Thus, Cassese notes:

While it is doubtful, in the absence of clear state practice and *opinio juris*, that states have a *duty* under customary international law to enforce international humanitarian law through criminal jurisdiction, states have jurisdiction to prosecute in the absence of a treaty pursuant to principles such as the universality principle and the passive personality principle. The principles on suppression of war crimes in the 1949 Geneva

³⁹⁴ Human Rights Watch/Africa. December 1994. *Ethiopia: Reckoning Under the Law*. 6 (11) [online]. [Accessed on 13 September 2011]. Available from World Wide Web :< <http://www.hrw.org/reports/pdfs/e/ethiopia/ethiopia94d.pdf>>, at 14. Human Right Watch/Africa stated, in relation to the transition in Ethiopia, that a duty to prosecute exists under the Geneva Conventions and further noted, “although the TGE is a transitional government, it is still obliged to fulfil Ethiopia’s state duties under international law, which include prosecuting former human rights violators.”

³⁹⁵ OLSON, Above n 384, at 280. These treaties include:- the 1954 Hague Convention for the Protection of Cultural Property, and the second Protocol to the 1954 Hague Convention for the Protection of Cultural Property, the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, the Amended Protocol II to the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their destruction. Antonio Cassese also notes “the obligation to prosecute is also said to arise by corollary with the right to an effective remedy: the obligation on the state to provide effective remedies to persons within its jurisdiction is complemented by the obligation to prosecute persons responsible for such violations, whether occurring in conflict or otherwise.” Antonio Cassese, at page 5

³⁹⁶ Miša Zgonec-Rožej and Joanne Foakes, Above n 385 at 2-3. This is clear from the following questionings “... is there an obligation to extradite or prosecute under customary international law, binding on all states? If so, does it apply in respect of all or merely some crimes under international law?”. It may be argued that “the prohibition of certain crimes under international law, including genocide, crimes against humanity and war crimes, derive their authority from a peremptory norm (*jus cogens*) from which no derogation is ever permitted. A violation of such a norm gives rise to a corresponding obligation *erga omnes* – an obligation owed by states to the international community as a whole – either to institute criminal proceedings or to extradite the suspect to another competent state.”

Conventions are said to be 'declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.'³⁹⁷

In addition, customary international humanitarian law extends the definition of war crimes to encompass other serious violations of IHL in both international and non-international armed conflict including serious breaches of Article 3 common to the Geneva Conventions.³⁹⁸ Hence, Olsen argues:

The extension of war crimes to cover acts in non-international armed conflicts is of great significance, as nowadays most conflicts are internal, and transitional governments or transitional democracies, if associated with armed conflict at all, were usually brought about by non-international armed conflict.³⁹⁹

The above points show that international humanitarian law imposes a duty on states to prosecute war crimes. The duty to prosecute or extradite also exists under the Rome Statute establishing the International Criminal Court.⁴⁰⁰ For our purpose, it suffices to note, as a matter of treaty obligation or customary international humanitarian law, states have a duty to exercise criminal jurisdiction over war crimes.⁴⁰¹

(ii) Duty to Prosecute under International Human Rights Law

International Human Rights Law aims at protecting human beings by setting out the rights and freedoms to which all human beings are entitled. It at the same time imposes obligations on states. However, these obligations are usually framed in a general manner, for example, they provide that states have the duty to respect and ensure the rights recognized therein. The basic issue may be what consequences follow if there are violations. In such cases, the law

³⁹⁷ ANTONIO CASSESE, Above n 393 at 5

³⁹⁸ OLSON, Above n 384, at 280

³⁹⁹ OLSON, Above n 384, at 280

⁴⁰⁰ Miša Zgonec-Rožej and Joanne Foakes, Above n 385 at 2. The International Criminal Court may try the core crimes of genocide, war crimes and crimes against humanity if they were committed after 1 July 2002 when the ICC Statute entered into force and have been committed by a national of a state party or within a state party's territory. It should however be recognized that the crimes that were subject to the Ethiopian transitional justice process were committed before this date, and thus the obligation to prosecute under the Statute is not relevant for Ethiopia.

⁴⁰¹ OLSON, Above n 384, at 280

provides that states have the duty to provide appropriate remedies without specifying what these remedies might be. This might depend on a number of factors relative to each state.⁴⁰²

Our concern here is whether states have a duty to prosecute violations of human rights. Some writers refer to general principles of international human rights law and the Nuremberg Trials in addition to existing treaties to establish the duty to prosecute human rights violations.⁴⁰³ However, the scope of such a duty is uncertain.⁴⁰⁴ Orentlicher noted that:

The most explicit obligations to punish human rights crimes that are likely to be relevant to societies emerging from dictatorship are established by the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention').⁴⁰⁵

We might also find some other treaties that incorporate the duty to prosecute or extradite.⁴⁰⁶ At this juncture, it is useful to note that Ethiopia is a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and that the crime of Genocide was incorporated into the Ethiopian Penal Code of 1957, which was the basis for prosecuting the Dergue leaders and members.⁴⁰⁷

⁴⁰² These factors may relate to economic and institutional capabilities of states.

⁴⁰³ ORENTLICHER, Above n 367. Professor Diane provides a more detailed discussion on the duty to prosecute under international law.

⁴⁰⁴ See OLSON, Above n 384, at 281. See also ORENTLICHER, Above n 367.

⁴⁰⁵ ORENTLICHER, Above n 367. Orentlicher suggests that the duty to prosecute genocide also exists in customary international law

⁴⁰⁶ See OLSON, Above n 384, at 281. These treaties include:- The 1930 Convention Concerning Forced Labour, The 1999 International Convention for the Suppression of the Financing of Terrorism, The 1979 International Convention Against the Taking of Hostages, The 1994 Inter-American Convention on the Forced Disappearances of Persons, The 1956 Slavery Convention, The 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, and The 1998 Rome Statute of the International Criminal Court.

⁴⁰⁷ See Article 281 of the Penal Code of the Empire of Ethiopia, Proclamation No. 158 of 1959, Negarit Gazette, 16th Year No.1. Article 281 of the Code, under the heading Genocide and Crimes against Humanity provides that: "Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace: (a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death." What is peculiar about the Ethiopian national law is that it protects political groups in addition to the other groups protected in the international Convention. In other words, according to Ethiopian penal law, acts intentionally carried out to destroy, in part or in whole, political groups constitute a crime of genocide. Articles 282-292 deal with war crimes, and some Dergue military personnel and leaders were also prosecuted for these crimes.

Apart from the foregoing subject-specific conventions, general human rights treaties do not provide specific duty either to prosecute or to extradite violators of human rights. This is clearly noted as follows:

The more comprehensive human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) do not explicitly require states parties to prosecute violators of rights protected in the treaties.⁴⁰⁸

Hence, these general human rights treaties, although state the duty to provide remedy for violations, lack clarity whether there is a specific duty to prosecute or extradite violators.⁴⁰⁹ Nevertheless, such a duty is implied through interpretation.⁴¹⁰ Ratner, thus, notes:

What constitutes an effective or adequate remedy has been subject to interpretation by human rights courts and commissions and, despite the absence of a ‘black-letter’ obligation to prosecute, these bodies have proclaimed such a principle.⁴¹¹

Despite the absence of an explicit duty to prosecute human rights violations, human rights courts and commissions including the Inter-American Court of Human Rights, the European Human Rights Court, and the UN Committee on Human Rights infer the existence of such duty.⁴¹² We might say that the “...bodies that monitor compliance with several human rights treaties that are textually silent about punishment have made clear that investigation and prosecution play a necessary part in the States Parties’ fulfilment of certain duties under the conventions.”⁴¹³ One may say these are authoritative interpretations on the duty to prosecute violators, for example, the UN Human Rights Commission has emphasized the “duty to investigate and prosecute torture, disappearances, and extrajudicial execution.”⁴¹⁴

The Special Rapporteur for the Commission on Human Rights adopts a similar position:

⁴⁰⁸ Human Rights Watch/Africa, Above n 394, at 14

⁴⁰⁹ OLSON, Above n 384, at 281

⁴¹⁰ OLSON, Above n 384, at 281

⁴¹¹ STEVEN R. RATNER. 1999. New democracies, old atrocities: an inquiry in international law, *Georgetown Law Journal*, **87**, at 707, 735 cited in OLSON, Above n 375, at 281

⁴¹² OLSON, Above n 384, at 281-282. Whether the African Human rights Commission or Human Rights Court, has similar position is not clear.

⁴¹³ ORENTLICHER, Above n 367

⁴¹⁴ Human Rights Watch/Africa, Above n 394, at 14

Impunity arises from a failure of States to meet their obligations to investigate violations, to take appropriate measures in respect of perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and punished...⁴¹⁵

This shows that states have, among other things, the duty to investigate, try and punish human rights violators. According to Louis Joinet, the right to justice is among the three rights to which victims of human rights are entitled.⁴¹⁶ Generally, the duty to prosecute violations of human rights exists both explicitly in some treaties and through interpretation of the general obligation of states enshrined in other international human rights treaties.

Hence, it would appear to be so that there exists a duty to prosecute or extradite perpetrators of international humanitarian and human rights law. However, whether and to what extent this duty constrains the choices available to a society in determining its preferred mechanism of responding to past violations is open to question. The foregoing discussion is relevant to this study because, as will be shown in chapter five, the duty to prosecute under international law forms part of the debate about the appropriateness of prosecution process in the Ethiopian transition.

Notwithstanding its apparent prevalence, criminal prosecution as a mechanism for dealing with past abuses is not without substantial criticism. Some hold that the notion of reconciliation is a *sine qua non* for democracy and insist that criminal prosecution is an obstacle to reconciliation.⁴¹⁷ Nevertheless, the question arises as to whether reconciliation can be possible without some form of criminal punishment. One argument against prosecution is that "...to leave the past alone is the best way to avoid upsetting a delicate process of transition or to avoid a return to past dictatorship [and reopening the victims old wounds]." ⁴¹⁸ This is a warning that societies in transition should forget the past and focus on the future. It argues against efforts to address the past, whether through prosecution or other mechanisms, for fear that any such effort may be counter-productive. Hence, this view would

⁴¹⁵ LOUIS JOINET, "Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)", Revised Final Report Pursuant to SubCommission Decision 1996/119, U.N. SubCommission on Prevention of Discrimination and Protection of Minorities, 49th Session (Joinet Report), U.N. Doc.E/CN.4/Sub.2/1997/20/Rev.1 cited in OLSON, Above n 384, at 282. She, however, noted the need for supplementary measures as well.

⁴¹⁶ See OLSON, Above n 384, at 282-283. She formulated the right to know, the right to justice, and the right to reparations.

⁴¹⁷ OLSON, Above n 384, at 279

⁴¹⁸ OLSON, Above n 384, at 275

favour amnesty laws exonerating perpetrators. However, this view on amnesty, or more accurately blanket amnesty, has increasingly lost favour in legal thinking.⁴¹⁹ Politically, it is difficult to conceive of a stable and new future without efforts to properly understand and deal with the past. There is no guarantee that the past will not return to haunt despite efforts of forgetting. However, the argument does highlight the difficulty of prosecuting past violations considering practical challenges facing a society. Should one insist on prosecution even if local circumstances do not warrant such process?⁴²⁰

In his examination of the South African transition, Kader Asmal presents opposing arguments such as *nai'vete' v real politik*, and asserts instead that a third way exists supporting the South African case.⁴²¹ The responses to past violations, arguably, should be based on a consideration of the facts on the ground, which Kader terms as *realpolitik* or pragmatism.⁴²² Those who insist on prosecutions at all cost are accused of being penal law/criminal trial fundamentalists⁴²³ Hence, Asmal notes that “...given the complexity of justice in transitional situations, the simplifications insisted up on by penal law fundamentalists are helpful neither to South Africa, nor to transitions elsewhere.”⁴²⁴

Kader's criticism of criminal trial is based on its punitive or retributive nature.⁴²⁵ However, apart from retribution, prosecution may also serve other objectives like deterrence. Nevertheless, the punitive aspect of criminal trials is thought to prevent the creation of conditions for peace, stability and reconciliation. One of the objections against trials is that “the political situation may be such that trials are not a possibility - it may destabilize the peace agreement or obstruct the transition to democracy.”⁴²⁶ However, a response to this argument might be that sustainable peace and democracy, and even reconciliation, should be

⁴¹⁹ see OLSON, Above n 384; JOHN DUGARD.1999. Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?”. *Leiden Journal of International Law, Kluwer International Law*. 1999. Currently, the issue is more not one of choice between amnesty and prosecution but on whether a third option, truth and reconciliation, is allowed under international law and desirable for a society..

⁴²⁰ Such circumstances may include society's choice not to reopen past wounds, or the need to avoid further conflict, or to give priority to truth and reconciliation, or to the economic and institutional capacity of the state.

⁴²¹ See ASMAL,K, Above n 320 citing D.F.Orentlicher, ‘Settling Accounts: The Duty to Prosecute...’, <http://www.jstor.org/stable/1097462> Accessed on 11/11/2011.

⁴²² ASMAL,K, Above n 320. See for example C.S. Nino, Response: The Duty to Prosecute Past Abuses of Human Rights put in Context: The case of Argentina’ in N.J. Kritz (ed), *Transitional Justice* (United States Institute of Peace Research, 1995, all cited ASMAL,K, Above n 320.

⁴²³ ASMAL,K, Above n 320, at 13

⁴²⁴ ASMAL,K, Above n 320, at 13

⁴²⁵ ASMAL,K, Above n 320, at 14. Asmal questions whether justice is best served by taking retribution against those who have offended our views of justice, or by inducing the offender to see the error of his or her ways.

⁴²⁶ MOBBEK, E, Above n 315 at 277

based on justice and accountability, which includes some degree of retributive justice.⁴²⁷ Accordingly, criminal trials should not be seen as a freestanding response to the past but as part of a holistic strategy.

The argument for criminal prosecution becomes more problematic however, where many people were involved in past violence. One criticism against trials is that “local judicial systems are not able to handle the potentially vast number of cases and hence only a few cases will be heard and the process will seem arbitrary and unfair.”⁴²⁸ Rwanda is cited as an example that tried to deal with nearly all perpetrators through criminal prosecution/justice, which compounded the problems rather than solve them.⁴²⁹ However, the problem can be avoided by adopting a combination of methods of transitional justice whereby some key violators can be prosecuted – signifying impunity no longer reigns - while others may be dealt with through other processes.⁴³⁰ Hence, it is not essential to bring all violators to one justice process.⁴³¹ This point is particularly relevant to the analysis of the Ethiopian transitional justice process, as the intention was to prosecute all members of the Dergue or its affiliates involved in past violations.⁴³² Whether this was achieved in light of the capacity of Ethiopian institutions of justice (including courts) and whether it was even desirable is discussed in the subsequent chapters.

In her discussion of the challenges faced by criminal prosecution in a transition from conflict to peace, Pankhurst observes that:

Where relatively few individuals are cast as being responsible for war crimes, and there is a clear victor who has unchallenged power to determine the process of justice and who is also able to act as self-appointed judges, it is possible to have a narrowly focused process of prosecution, such as the Nuremberg trials after the Second World War.⁴³³

⁴²⁷ MOBBEK, E, Above n 315 at 277-278

⁴²⁸ MOBBEK, E, Above n 315 at 278

⁴²⁹ MOBBEK, E, Above n 315 at 278

⁴³⁰ MOBBEK, E, Above n 315 at 278-279

⁴³¹ MOBBEK, E, Above n 315 at 279

⁴³² It is important to recall here that other political groups were excluded from prosecution, and were not held accountable under any other process; see discussion in chapters 2, 5 and 6.

⁴³³ PANKHURST, D, Above n 329 at 241-242

Some key implications follow. First, the idea of narrowly focused process of prosecution might also apply to societies emerging out of authoritarian and repressive regime. Second, a narrowly focused process of prosecution is possible if there is a victorious party and if few people are considered as violators; the difficulty, or even impossibility, of prosecution if too many people were involved in violations is clear. Thirdly, it implies that the existence of a victorious party is a condition for criminal prosecution implying that in cases of negotiated transitions it would be difficult or impossible to have prosecution. In other words, negotiated transitions would give former leaders an opportunity to join the new regime and this may compromise the possibility of prosecuting past violations.⁴³⁴ Fourthly, the victorious party who also acts as a self-appointed judge decides the justice process. This would result in what is commonly called victor's justice giving rise to controversies regarding the need for reconstructing a society and establishing a new system that departs from the past.

Another problem related to criminal prosecution is the inability or difficulty to deal with too many violators. In conflict situations or repressive regimes, usually many people are involved in war crimes or other violations.⁴³⁵ Is it possible therefore to prosecute all people so involved? There are resource constraints and other technical problems. Even if such problems are addressed, wholesale prosecution may give rise to other undesirable consequences. In cases of full-scale prosecution, it may be "difficult to avoid prosecution being seen as vengeance, even if full prosecution of all parties is attempted."⁴³⁶ This perception of vengeance is likely to affect society's transition to a better future. Although retributive and punitive justice is associated with vengeance, the perception of retribution may be prevented by conducting trials properly.⁴³⁷ The judicial process is even conceived as reducing the "chances of vigilante justice and a spiral of vengeance and violence...by transferring individual's desire for revenge to the state or official bodies".⁴³⁸ When it comes to the Ethiopian transition, as will be shown in the next chapters, wholesale prosecution of Dergue members or their affiliates were attempted while members of other political groups were excluded; and as will be shown, this has given rise to different perceptions of the judicial and prosecution process.

⁴³⁴ PANKHURST, D, Above n 329 at 242

⁴³⁵ PANKHURST, D, Above n 329 at 242

⁴³⁶ PANKHURST, D, Above n 329 at 242

⁴³⁷ MOBBEK, E, Above n 315 at 277

⁴³⁸ MOBBEK, E, Above n 315 at 277-278

Another problem associated with criminal processes is the difficulty of achieving reconciliation:

Even if the logistical problems of prosecuting thousands, or even millions, of people could be overcome, there are still difficult issues of judgement to be made about the type of punishment appropriate where reconciliation is hoped for.⁴³⁹

This view highlights the problems that we need to be aware of between prosecution and reconciliation. This in itself does not necessarily mean that criminal prosecution is incompatible with reconciliation. It rather suggests the difficulty of ensuring reconciliation while at the same time punishing violators. However, one may say, “an ability to reconcile seems to require some degree of forgetting, as well as forgiveness, which is not compatible with long, drawn-out prosecutions which keep alive the issues which contributed to the conflict in the first place.”⁴⁴⁰ The counter argument could be although forgiveness is necessary for reconciliation, genuine reconciliation cannot be founded on a blind past; it rather requires the proper understanding of the past and it is possible to forgive without forgetting the past. However, the argument can be that reconciliation is incompatible with prosecution, particularly where it is a prolonged one. We might generally say that a combination of transitional justice processes is essential to enable reconciliation; prosecution alone is not a good solution.⁴⁴¹ Prosecution may contribute to reconciliation if complemented by other transitional justice processes.

Some writers, therefore, warn against wholesale prosecution, which may lead to undesirable results or such perceptions, contrary to the declared objective of doing justice. This is clear from the following statement:

The stakes become high in criminal prosecutions; a process, which is set up to met out justice but which ends being partial or incomplete or being seen in that way for many reasons is often regarded as having made the situation worse. New cycles of

⁴³⁹ PANKHURST, D, Above n 329 at 242

⁴⁴⁰ PANKHURST, D, Above n 329 at 242. She also argues this problem is “especially the case where issues of identity were part of the causes of the conflict”.

⁴⁴¹ MOBBEK, E, Above n 315 at 279

resentment are likely to be triggered where there has been a history of violence followed by impunity and vengeance...⁴⁴²

This is a warning that even the perception of partiality or incompleteness of criminal prosecution would negatively affect the whole purpose of transitional process of accountability and even may turn things from bad to worse. This is particularly problematic in societies with a ‘history of violence and impunity’. One may also argue that criminal prosecution, if adopted, must overcome such perception by addressing the reasons that give rise to these perceptions. This point is relevant to the Ethiopian case as the process is subject to criticism for its partiality and incompleteness as elaborated in the subsequent chapters. However, as discussed earlier, whether wholesale prosecution is possible is a difficult issue in itself.

Wholesale prosecutions might be problematic in both their operation and results as noted below.

Mass prosecutions are not only seen as costly and time-consuming, but also counter productive in terms of reconciliation and peace if too many old wounds are reopened on both or all sides.⁴⁴³

It is clear that prosecuting many people would require the mobilization of huge resources and time, with implications on resources. Moreover, it may be detrimental to reconciliation efforts and peace building. The challenges of mobilization of resources for prosecution and the issue of compatibility of prosecution with reconciliation are important aspect of the analysis of the Ethiopian transitional justice process.⁴⁴⁴

The foregoing discussion demonstrates that proponents of criminal prosecution base their argument on its multiple outcomes, general practice, and recognition under international law. They also reject other processes that exclude prosecution; amnesty, or more accurately blanket amnesty is rejected. On the other hand, opponents argue against the prescription of prosecution as a panacea for transitional societies, and assert that transitional processes of justice must consider the circumstances surrounding each case. Thus, they argue in favour of

⁴⁴² PANKHURST, D, Above n 329 at 242 These reasons are “fear, poor information, inadequate legal support, and being overruled by new leaders.”

⁴⁴³ PANKHURST, D, Above n 329 at 242

⁴⁴⁴ A detailed analytical discussion of these problems in Ethiopia is provided in chapters 5 and 6.

a third way.⁴⁴⁵ However, even proponents of prosecution concede the need for an accommodation of local needs.⁴⁴⁶ Nevertheless, amnesty or blanket amnesty is losing its acceptance even by some opponents of prosecution, who propose a third way. It is noted that:

While there is no place for unconditional amnesty in the contemporary international legal order an intermediate solution such as Truth and Reconciliation Commission with power to grant amnesty after investigation, of the South African kind, may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution.⁴⁴⁷

This is a proposal for a third way to justice and peace, and suggests justice is better served through truth and reconciliation rather than prosecution. It also rejects wholesale amnesty, but seems to accept amnesty granted on condition of its contribution to truth and reconciliation.

Although different mechanisms of rendering justice are proposed, the appropriateness of each has to be measured in light of the context in which it is adopted. In analyzing how a society has addressed questions of justice during transition, one has to raise the following specific questions in each case.

1. What and whose conception of justice is formulated and how and why is it formulated?
2. What institutional mechanisms are in place to translate it to reality? Are they appropriate in that particular circumstance?
3. How is the process seen by members of the society in terms of addressing past violations and creating a new future?

Before concluding the present discussion, certain points might be outlined as relevant regarding what the Ethiopian transition says about justice. As discussed earlier, the main transitional mechanism of accountability adopted in Ethiopia was criminal prosecution. The legal foundation for this was Proclamation No.22/1992. This proclamation, apart from establishing the Office of the Special Prosecutor, specifically provides the objectives of the criminal prosecution. Paragraph 4 of the preamble of the proclamation states that individuals

⁴⁴⁵ ASMAL, K, Above n 320

⁴⁴⁶ ORENTLICHER, Above n 367

⁴⁴⁷ DUGARD, Above n 419. See also OLSON, Above n 384; PANKHURST, D, Above n 329

suspected of committing human rights violation and other crimes “must be brought to trial.” The implication is that, the perpetrators of past crimes shall be tried and punished. Hence, justice is one component of the Ethiopian transitional process of accountability.

However, the question remains as to the conception of justice that is incorporated into the proclamation. Apart from stating the general objectives of the criminal process, the proclamation does not provide any explicit definition of justice. However, it would appear that the Ethiopian transition emphasises punitive /retributive justice. The proclamation also refers to deterrence implying the presence of a conception of deterrent justice. It also underlines the importance of recording the history of past violations – truth – and this may be taken as historical justice. A closer examination of the issues of justice in the Ethiopian transitions will be undertaken in the next chapter

In concluding this sub-section, it is clear that justice has been recognized as one essential goal of transitional societies in general and Ethiopian transition in particular. Arguably, there is a right to justice, which belongs not only to victims/relatives but also to the public. However, the concept of justice itself is very controversial and is affected by different factors. We also noted that there are different forms of justice including deterrent justice, compensatory justice, rehabilitative justice, justice as an affirmation of dignity, and justice as exoneration. There is no one single mechanism of rendering justice; the rendering of justice by criminal justice process is one among the different process and appear to have multiple advantages. However, criminal justice processes face significant criticism.

4.3 Truth

Among the basic objectives or goals of transitional justice mechanisms is the establishment of the truth. The truth about the past is thought to have significance for societies in transition for various reasons. The truth is considered as part of justice in its broadest sense, and one may view truth as reparatory as well as a condition for reconciliation. Truth is about knowing and officially acknowledgment of past human rights abuses.⁴⁴⁸ This element of transitional

⁴⁴⁸SARKIN, J. 2000. Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s approach in the New Millennium of Using Community-Based Gacaca Tribunals to Deal with the Past. *International Law Forum*, at 115

justice may be referred to as ‘historical justice’.⁴⁴⁹ We might say that victims or relatives and the society in general have the right to know the truth about the past. In this section, an attempt is made to explain the meaning and significance of truth, the various mechanisms of searching for truth as well as whether it has emerged as a legal right. This will serve as a basis for evaluating whether truth has been incorporated into the Ethiopian transitional justice and to enquire whether in the public perception this aim has been perceived to be achieved in Ethiopia.

4.3.1 The Meaning of Truth

Various disciplines address the question ‘what is of truth’.⁴⁵⁰ Nevertheless, this concept remains a subject of theoretical controversies. After arguing that truth is a social matter in the context of the right to truth in transitional justice, Yasmin Naqvi suggests, “[a] commonly accepted definition of truth is the agreement of the mind with reality.”⁴⁵¹ According to William James, “true ideas are those we can assimilate, validate, corroborate and verify.”⁴⁵² This means “...truth is measured by way of evidence.”⁴⁵³ According to Aristotelian thought, truth is the correspondence between the proposition and the reality of which the proposition is made.⁴⁵⁴ There are various philosophical and religious conceptions of truth.

An important issue arises whether truth can be objectively established (and even if this is ever possible) or whether it is always a subjective narration. On the one hand, there are arguments that truth cannot exist outside of power relations. Michel Foucault noted, “truth is not outside power, or lacking in power...”⁴⁵⁵ This point indicates not only that truth is very much subjective, but also underlines the relationship between power and truth. It implies that the truth is what the speaker (of power) says so. Others however stress that truth relates to

⁴⁴⁹ TIETEL, RG, Above n 365 at 69-117.

⁴⁵⁰ TIBOR KIRALY. 1976. *Criminal Procedure, Truth and Probability*. Budapest: Akademiai Kiado, at 93. It is noted that “truth is a concept belonging to the sphere of epistemology and logic; but other disciplines such as semantics and psychology are also concerned with it, indirectly at least” (p.93)

⁴⁵¹ YASMIN NAQVI. *The Right to Truth in International Law: Fact or Fiction?* International Review of the Red Cross. **88** (862), at 250

⁴⁵² NAQVI, Above n 451 citing William James, *Essays in Pragmatism*, Hafner Publishing Company, Inc., New York, 1948, p.160 cited in Yasmin Naqvi, *supra*note 451, at 250

⁴⁵³ NAQVI, Above n 451, at 250

⁴⁵⁴ KIRALY, Above n 450, at 93

⁴⁵⁵ NAQVI, Above n 451 citing Michel Foucault, at 443

something objective.⁴⁵⁶ The notion of objectivity of truth can be observed from the following assertions:

Truth and falsity is the relationship between proposition and events. [It] is not reality itself, it is not the property of events, things, phenomena; it is the property of propositions. Events, things take place, exist and propositions tell something about them that may be true or false; The truth of propositions can be decided on the basis of a comparison with reality.⁴⁵⁷

This suggests that the truth can objectively be established by comparing the proposition with reality, although such comparison may be difficult or even impossible in some cases, for example, in relation to past events. The objective nature of truth is more emphatically stated in the following terms:

Truth is objective in the sense that it expresses reality, that it has a content independent of the cognizing subject; this is a content of our knowledge, which does not depend on the subject. The recognition of objective truth is closely connected with the reflection theory on the reflective capacity of reality, and with the view that man is capable of perceiving the truth; these capacities practically materialize in objective truth.⁴⁵⁸

It is further noted that “objectivity is so much a part of truth that there exist no truth at all without it; namely ‘truth’ that does not contain the objective element is no truth, it may be perhaps the opposite, i.e. falsity”.⁴⁵⁹ Nevertheless, the importance of the subjective element is recognized as “...the subjective element, the subject whose consciousness reflects reality, also plays a part in truth; we could not speak of truth without them, we could only speak of reality which is neither true nor false.”⁴⁶⁰

The objectivity of truth is a contested subject. In the context of transitional societies, it may be difficult or impossible to talk of the truth of the past because the truth is textual. Jacques

⁴⁵⁶KIRALY, Above n 450, at 96

⁴⁵⁷KIRALY, Above n 450, at 96

⁴⁵⁸KIRALY, Above n 450, at 96

⁴⁵⁹ KIRALY, Above n 450, at 96 It is noted that “to say that what is is not, or that what is not is, is false” (p.96)

⁴⁶⁰ KIRALY, Above n 450, at 96

Derrida argues “...there is nothing outside the text; all is textual play with no connection with original truth.”⁴⁶¹ Yasmin Naqvi argues that Derrida’s thinking would lead us to the conclusion that truth or the right to truth relates to the “... official statement about what happened; which may or may not accord with what did actually happen but still requires on the part of the state the duty to disclose something.”⁴⁶² Such official statements need not be restricted to so-called western notions of writing but cover varieties of history-tellings.⁴⁶³ What is important to note here is the non-objectivity of truth. The subjectivity of interpretation of the past and determination of truth can also be derived from the assertion that “history is exploring historical truths of the past out of a present interest.”⁴⁶⁴

Postmodernist thinkers, who view truth as “ the construct of the political and economic forces that command the majority of power within the societal web”, contest the objectivity of truth.⁴⁶⁵ Michel Foucault argued that “truth is a thing of this world; it is produced only by virtue of multiple forms of restraint”.⁴⁶⁶ Thus, truth is to be conceptualized as “system of ordered procedures for the production, regulation, distribution, circulation and operation of statements.”⁴⁶⁷ What is the implication of such thinking to the search for truth in transitional societies? Given that postmodernist thinking may be characterized by its apparent abandonment of truth, a criticism that has been made is that postmodernist thinking would lead to “...extreme relativism that ...leaves the door open to fascist or racist views of history, with no way of saying these ideas are false.”⁴⁶⁸

From the discussion above, we note that the meaning and nature of truth is indeed controversial. In transitional justice, the concern relates to statements about what happened. For some commentators, a statement about what happened can be true if it can be objectively proved (or verified by evidence) and thus yielding truth. For others, it is somehow subjective. For others, it is simply a social construct in the sense that the truth is what the speaker (of power) states to be true. In transitional contexts, truth-telling processes should be broad enough to allow the expression of the widest possible narration of history. The postmodernist

⁴⁶¹ JACQUES DERRIDA. 1985. *Prophets of Extremity*. Berkley: University of California Press cited in NAQVI, Above n 451, at 250

⁴⁶² NAQVI, Above n 451, at 250-251

⁴⁶³ NAQVI, Above n 451, at 251

⁴⁶⁴ DERRIDA, cited in NAQVI, Above n 451, at 251

⁴⁶⁵ NAQVI, Above n 451, at 252

⁴⁶⁶ MICHEL FAUCOULT cited in NAQVI, Above n 451, at 252

⁴⁶⁷ NAQVI, Above n 451, at 252

⁴⁶⁸ NAQVI, Above n 451, at 252

account about truth and power may be critical and relevant in the context of the ‘propositions’ that set out a public truth or memory where the whole process of ‘truth-telling’ (voices and silences) is controlled by one group. Given the complexity of the concept of truth, it is difficult to adopt a particular position. Nevertheless, for the purpose of analysis of the Ethiopian transitional justice process, this study uses the commonly accepted definition of truth - the correspondence between a proposition and reality. The proposition is nevertheless not about the here and present but it is about the past. Thus, truth in transitional societies relates to the investigation and discovery of what happened in the past, more specifically to the identification of past violations and the circumstances that led to such violations. This may call for an impartial and comprehensive mechanism of searching for and establishing the truth. However, this search for and discovery of the truth is generally necessitated out of present need to settle the past and build a better future, and this is the subject of the following sub-section.

4.3.2 The significance of truth to transitional societies

Truth, even ‘legal truth’, is thought of as having significance to individual victims/their families as well as to the society as a whole. Some writers argue that this significance of truth has led to the emergence of the ‘right to truth’ under international law.⁴⁶⁹ It is noted, “the right to truth has emerged as a legal concept at the national, regional and international levels, and relates to the obligation of the state to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights.”⁴⁷⁰ The recognition and enforcement of this right is an essential component of transitional justice. Although whether such a legal right to truth exists is controversial, the significance of truth to transitional societies is beyond doubt such that many transitional justice processes have incorporated the quest for truth as their declared objective. Thus, it is important to briefly discuss the significance of truth to societies in transition.

Alice H. Henkin clearly stated the importance of truth:

⁴⁶⁹NAQVI, Above n 451, at 252

⁴⁷⁰NAQVI, Above n 451, at 245

Successor governments have an obligation to investigate and establish the facts so that the truth be known and be made part of the nation's history. There must be both knowledge and acknowledgement: the events need to be officially recognized and publicly revealed. Truth telling... responds to the demand of justice for the victims and facilitate national reconciliation.⁴⁷¹

Yasmin Naqvi notes, "[t]he right to truth would intermesh strategically with the broader objectives of international criminal law".⁴⁷² First, truth may help to reinstate or sustain peace because the exposure of the truth might enable societies to avert the occurrence of similar situations.⁴⁷³ This is arguably true of the truth to be derived from national criminal processes or other national mechanisms set up to search for and establish the truth. Secondly, truth may facilitate the process of reconciliation because divided societies can re-establish their relationship if they know the truth.⁴⁷⁴ The Chilean National Commission on Truth and Reconciliation affirmed that "only upon a foundation of truth will it be possible to meet the basic demands of justice and create the necessary conditions for achieving true national reconciliation".⁴⁷⁵ We might say that "reconciliation as a goal cannot be imposed, and thus it must be built."⁴⁷⁶ However, reconciliation requires victims' knowledge of the past and acknowledgment particularly on the part of the wrongdoer.⁴⁷⁷ Thus, truth might be seen as an essential element for reconciliation.⁴⁷⁸ Nevertheless, the relationship between truth and peace, or truth and reconciliation, remains controversial because some argue that investigating and establishing the truth may open past wounds and lead to further conflicts rather than to peace and reconciliation.⁴⁷⁹

Thirdly, the truth can contribute to ending impunity because accountability can be ensured only if the truth about who committed past crimes is known.⁴⁸⁰ However, the relationship between truth and accountability is not always clear especially in case of criminal

⁴⁷¹ ALICE H. HENKIN (ed). 1989. *State Crimes: Punishment or Pardon*. Queenstown, Md: Aspen Institute, pp.4-5 cited in TIETEL, RG, Above n 356 at 69

⁴⁷² NAQVI, Above n 451 at 247

⁴⁷³ NAQVI, Above n 451 at 247

⁴⁷⁴ NAQVI, Above n 451 at 247

⁴⁷⁵ Supreme Decree No. 355 cited in NAQVI, Above n 451 at 247

⁴⁷⁶ OLSON, LM, Above n 384 at 277

⁴⁷⁷ OLSON, LM, Above n 384 at 277

⁴⁷⁸ OLSON, LM, Above n 384 at 277

⁴⁷⁹ See OLSON, LM, Above n 384 at 275. Olson notes that "leaving the past alone is the best way to avoid upsetting a delicate process of transition."

⁴⁸⁰ NAQVI, Above n 451 at 247. Here, one can note a discussion on the various components of the right to truth

accountability (justice). Some writers, preferring truth over justice and drawing from Chilean and South African experience, argue, “truth reports should replace trials”.⁴⁸¹ However, one may also argue that there was a parallel procedure of prosecution in South Africa.⁴⁸²

Fourthly, truth can also facilitate the “[reconstruction] of national identities because it unifies countries through dialogue about shared history.”⁴⁸³ It is argued, for example, that the establishment of the truth has significantly contributed to the reconstruction of German Unity.⁴⁸⁴ One may argue that truth can contribute to ‘the settling down of a historical record because the truth of what happened can be debated openly and vigorously in court, adding credibility to the evidence accepted in criminal judgment.’⁴⁸⁵ The exposure of the truth about past crimes might be considered as a form of reparatory justice for victims.⁴⁸⁶ Finally, the right to truth might help victims and the public to access public documents, which were kept secret.⁴⁸⁷ This access would help to know the truth contained in these documents.

This multifaceted significance of truth, arguably, has led the UN Commission on Human Rights to recognize the right to truth. The Commission adopted Resolution 2005/66, which ‘recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.’⁴⁸⁸ This right to truth is unequivocally stated in the work of Louis Joinet, an independent expert on impunity appointed by the UN Commission on Human Rights.⁴⁸⁹ In the 1997 final report, Joinet noted:

Every people have the inalienable right to know the truth about past events and about circumstances and reasons, which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.⁴⁹⁰

⁴⁸¹ OLSON, LM, Above n 384, at 278 citing Charles Krauthammer, ‘Truth :Not Trials: A way for the newly liberated to deal with the crime of the past, Washington Post, 9 September 1994, at A 27)

⁴⁸² OLSON, LM, Above n 384, at 278

⁴⁸³ NAQVI, Above n 451, at 247

⁴⁸⁴ NAQVI, Above n 451, at 247

⁴⁸⁵ NAQVI, Above n 451, at 247

⁴⁸⁶ NAQVI, Above n 451, at 247

⁴⁸⁷ I NAQVI, Above n 451, at 247

⁴⁸⁸ NAQVI, Above n 451, at 248

⁴⁸⁹ NAQVI, Above n 451, at 259

⁴⁹⁰ JOINET, cited in NAQVI, Above n 451, at 259

This right belongs to the individual victim and his /her family as well as the society in general.⁴⁹¹ Moreover, it clearly calls for full and effective exercise of the right to truth, which would help prevent the recurrence of similar violations in the future. The corollary of the latter is a “duty to remember” on the part of the State: “to be forearmed against the perversions of history that go under the name of revisionism or negotiationism, for the history of its oppression is part of a people’s national heritage and as such must be preserved.”⁴⁹² Professor Diane Orentlicher, appointed by the Commission, has updated the principles contained in Mr. Louis Joinet’s report.⁴⁹³ The Updated principles on impunity incorporated the inalienable right to know the truth and guarantees to give effect to the right to know.

The abovementioned UN resolution and reports of experts not only recognize the right to the truth but they also provide the various components of the right. However, the legal status of such instruments and reports can be contested in that they are not in themselves legally binding instruments. Nevertheless, they reflect the emergence of the concept as well as the general acceptance of the significance of truth or the right to truth by the international community. The international legal status of truth may have relevance to domestic/national transitional processes. However, this study will not dwell on whether truth has emerged as a legal right or not, because establishing the truth is set as one of the explicit goals of the Ethiopian transitional justice process.⁴⁹⁴ What is more important here is to appreciate the significance of truth to transitional societies. Once we appreciate this significance, we may ask how the ‘truth’ can thus be appropriately established.

4.3.3 Mechanisms of Establishing Truth

Considering that truth is an essential component of transitional justice processes, the issue is how a society might achieve this objective; in other words, what institutional mechanisms should be put in place to discover the truth. From a comparative perspective, there are two main mechanisms. The first is through the establishment of truth commissions or truth and reconciliation commissions. Numerous such commissions have been established in different

⁴⁹¹ NAQVI, Above n 451, at 260

⁴⁹² NAQVI, Above n 451, at 259

⁴⁹³ NAQVI, Above n 451, at 260

⁴⁹⁴ *Proclamation for the Establishment of the Office of Special Prosecutor*. 1992. Proclamation No. 22/1992, Federal Nagarit Gazette, 1st Year, No.18, August 8/1992.

countries with a mandate to discover the truth, including the South African Truth and Reconciliation Commission. Mobbek noted, “the demand for truth and truth-telling after conflict has grown and the international community has sought to strengthen the emphasis on truth commissions.”⁴⁹⁵ The assumption here is that truth commissions as their name implies are best suited to search for and establish the truth. Nevertheless, one might say that truth is a complex subject, the complexity of which was recognized by few truth commissions making its discovery very problematic.⁴⁹⁶ Clearly, difficulties persist in searching for and establishing truth through truth commissions. However, the complexity of truth creates similar if not worse problems in other mechanisms of establishing the truth.

The other mechanism for the establishment of truth is through criminal proceedings. Truth in this case is usually referred to as judicial or legal truth, as it is the result of a legal proceeding and pronounced upon by courts. However, the transitional process itself may predetermine legal and judicial truth. As discussed in chapter 2, the Ethiopian transitional process provides a general depiction of the ‘truth’ of perpetrator/victim. This narrative is the basis for the prosecution process, and this process was expected to establish the truth within the parameters of the transitional narratives of past violations.

A question may be raised whether the above mechanisms will lead to the discovery of truth or of the nature and extent of the truths about the past that can be so discovered. The comparative advantage of the two mechanisms can also be a critical issue. However, as the mechanism established in Ethiopia was the judicial/legal process, more emphasis will be given to the latter. Hence, the following sub-section deals with the suitability of judicial processes as a means to discover the truth.

4.3.4 Judicial or Legal Truth

The term judicial truth or legal truth is used in this work to refer to the process of establishing the truth about past violence and atrocities through criminal proceedings. This sub-section addresses the issue whether criminal proceedings are suitable mechanisms for establishing the truth.

⁴⁹⁵ MOBBEK, E, Above n 315 at 264

⁴⁹⁶ MOBBEK, E, Above n 315 at 265

Tibor asserts, “the establishment of the truth is the most important goal of criminal procedure”.⁴⁹⁷ Clearly, the ultimate decisions of court as to the guilt or innocence of the accused is preceded by the search for and determination of the truth about the alleged crime and the circumstances surrounding it. The ‘right to truth’ may contribute to the attainment of the objectives of criminal law, including those of restoring and maintaining peace, facilitating reconciliation processes, contributing to the eradication of impunity, reconstructing identities and setting down a historical record.⁴⁹⁸ In addition, we may say “...the right to truth underlies the very process of criminal indictment by ensuring proper investigation of crimes and transparency as well as by requiring public access to official documents.”⁴⁹⁹

Obviously, there are different types of criminal procedures that may be adopted in trying to establish such truth. At least two procedural systems are well known; namely the inquisitorial and the adversarial systems.⁵⁰⁰ Because of its emphasis on the investigation and establishment of the truth, the inquisitorial system may allow improper methods of searching for evidence.⁵⁰¹ Although contemporary human rights laws does not permit certain processes of discovering the truth (e.g., the use of torture), in the inquisitorial system establishing the truth is not left to the parties to the dispute. Rather, the judge or jury has an active role in the collection of evidence and the determination of the truth. On the other hand, the adversarial system requires the parties to establish the truth with the judge acting as a neutral arbiter. Because of this passive role of judges, whether pure adversarial system is tasked with the search for and the establishment of the truth remains questionable.⁵⁰² A more critical question may be whether the criminal process, whether inquisitorial or adversarial, will in fact lead to truth or the whole truth. This issue is more critical in the context of the establishment of the truth of not just one crime but that of mass atrocities and violations committed in a relatively distant period. Hence, truth as a by-product of a criminal process, contained in court judgements and sentences, can be contested based on the procedural restrictions that are placed on the search for and establishment of the truth. After a judicial process, a perpetrator may be acquitted for lack of adequate evidence, and the implied judicial truth is that the perpetrator has not committed the crimes concerned. However, the truth could be different if

⁴⁹⁷ KIRALY, Above n 450, at 89

⁴⁹⁸ NAQVI, Above n 451, at 247

⁴⁹⁹ NAQVI, Above n 451, at 247

⁵⁰⁰ KIRALY, Above n 450, at 89

⁵⁰¹ KIRALY, Above n 450, at 89

⁵⁰² KIRALY, Above n 450, at 89

other non-penal processes were employed where the perpetrator has the incentive to reveal the truth rather than conceal it for fear of punishment. This was the thinking behind the South African Truth and Reconciliation process wherein perpetrators were granted amnesty upon disclosure of the truth about past crimes.⁵⁰³

The issue of whether court judgements tell the truth may be “a question of the adequate reflection of reality in the mind.”⁵⁰⁴ However, the key problem is one of proof.⁵⁰⁵ Prof. Tibor states, “...the question of how the truth of some propositions is proved, verified in criminal procedure is the central problem of criminal procedure, or a part of it at least.”⁵⁰⁶ This problem relating to evidence is, as will be shown in chapter 5, a critical problem in the Ethiopian transition.

Courts have a duty to establish the truth according to the procedures and conditions prescribed by the law.⁵⁰⁷ There is a general expectation that courts will know the truth and that any conviction will be based on such truth.⁵⁰⁸ However, controversies persist on the nature of the truth to be established.⁵⁰⁹ Are courts expected to establish an objective truth?

One argument is that courts are expected to render judgements on the basis of “maximum probability”.⁵¹⁰ According to Vishinsky, one should not expect courts “to solve the problem on the basis of absolute truth, but only from the aspect of the possible greatest probability of the facts submitted to judicial evaluation (or, more correctly, from the aspects of certainty).”⁵¹¹ What courts decide is not necessarily based on objective truth; but it is the closest to objective truth. This view highlights the problematic aspect of judicial mechanisms as instruments of searching for the truth. In other words, it shows the difficulty for courts to reach at objective truth.

⁵⁰³PAUL VAN ZYL. 1999. *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, Journal of International Affairs. **52**(2). New York : the Trustees of Colombia University, p. 8. A person has to fulfil two conditions to enjoy amnesty: “the person’s crime had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the act for which amnesty was sought”. (p.8)

⁵⁰⁴ KIRALY, Above n 450, at 97

⁵⁰⁵ KIRALY, Above n 450, at 97

⁵⁰⁶ KIRALY, Above n 450, at 97

⁵⁰⁷ KIRALY, Above n 450, at 106

⁵⁰⁸ KIRALY, Above n 450, at 106

⁵⁰⁹ KIRALY, Above n 450, at 106

⁵¹⁰ KIRALY, Above n 450, Citing A.J. Vishinsky, at 106

⁵¹¹ KIRALY, Above n 450, at 106

It is true that the law provides mechanisms and standards of proof in judicial proceedings. The standard of proof in civil proceedings is the preponderance of evidence - who among the parties has more evidence to convince the court. In criminal proceedings, the standard of proof is stricter in the sense that what is required is 'proof beyond reasonable doubt'. The term proof beyond reasonable doubt suggests that it is not necessary to reach at objective truth. Therefore, whether a well functioning judicial system establishes the truth about the past is contestable.

As indicated earlier, the stringent procedural safeguards associated with judicial processes and the emphasis on punishment might limit the discovery and exposure of the truth by courts. Generally, the connection between judicial processes and truth is problematic. In this respect, Yasmin Naqvi notes that:

Criminal processes, whether at national or international level, are primarily about meting out justice for alleged wrongs committed by individuals. The process entered into, at least from a common law perspective, is not so much about finding the truth as it is offering evidence that proves guilt or innocence - evidence that is contested, put into question, or interpreted in different ways to win a case.⁵¹²

The same problem may also arise in Civil Law systems. One might say, "the investigative method of civil law systems is arguably more concerned about finding the truth, but the end result is the same; the case is won or lost by convincing or failing to convince a judge or jury of guilt or innocence."⁵¹³ Therefore, there is a problem whether courts can reach at the truth not only as part of dispute settlement but also even when they are mandated to search for it. The problem is more critical when what is sought relates to grave violations committed as part of a political reality.

The foregoing discussion clearly shows that truth is an essential element of transitional justice process. However, the concept of truth and the mechanisms of establishing the truth remain the subject of controversy. The insights and contestations considered in the discussion above will serve as a basis for the examination of truth as a by-product of the Ethiopian transitional justice process. This study addresses, in subsequent chapters, the questions (1)

⁵¹² NAQVI, Above n 451, at 246

⁵¹³ NAQVI, Above n 451, at 246

what concept of truth is incorporated in the Ethiopian transitional justice process and (2) whether and to what extent the truth has been established through the resulting court proceedings.

4.4 Reparations

Reparation in transitional societies is aimed at rectifying past wrongs and hence is seen as part of reparatory justice⁵¹⁴ - an aspect of transitional justice processes. This section briefly discusses the meaning and significance of reparations in transitional societies. This element of transitional justice was not specifically set as an objective of the Ethiopian transitional process. Hence, the purpose here is to have a general understanding of this missing element and to consider what implications may follow from such omission.

Various writings on transitional justice view reparation as an essential component of transitional processes; the central idea of reparation is that victims of human rights violation or their families/relatives have some form of claim for compensation against successor regimes.⁵¹⁵ So, reparation in this sense is not a claim laid against individual perpetrators; it is rather a claim against the government (society) for wrongs done by the former regime. Reparation, therefore, is very much related to the notion of justice, giving rise to the notion of ‘reparatory justice’.

However, a number of critical issues arise in relation to reparation. What is the exact meaning of reparation? What is the purpose and function of reparation? What is the moral or legal basis of reparation? Who has the right to reparation, who is entitled to reparation? Who is the duty bearer? What is the nature of reparation - material, moral or symbolic? What is the general practice? .

In transitional periods, the notion of reparation is used in a more general way to represent various forms of remedying past violations. Tietel notes that the term ‘reparatory justice’ “illustrates its multiple dimensions, comprehending numerous diverse forms: reparations,

⁵¹⁴ TIETEL, RG, Above n 365 at 119

⁵¹⁵ See SARKIN, J, Above n 448, at 115.

damages, remedies, redress, restitution, compensation, rehabilitation, tribute.”⁵¹⁶ Hence, reparation may take different forms, and is broader than simply the payment of monetary compensation. According to Dr. Lutz Oette, reparation may be conceptualized as a right that “encompasses the right to an effective remedy, including courts and non-judicial mechanisms, and the right to substantive reparation, including individual and collective forms of reparation.”⁵¹⁷ A variety of forms of reparations, and mechanisms of dealing with them as well as the individual and collective aspect of reparations are therefore possible. Reparation generally may take either material or symbolic forms.⁵¹⁸ Material reparations consist of rehabilitation, restitution, and compensation.⁵¹⁹ On the other hand, symbolic reparations usually encompass a variety of measures including formal state apology, adopting commemoration days, building monuments and conducting proper funeral services.⁵²⁰

There are various historical and ancient accounts including Biblical accounts,⁵²¹ of the historical development and role of reparatory justice. Biblical reparation relates to redress in the sense of restoring ones dignity incorporating something beyond material compensation.⁵²² This ancient form of reparatory justice is evident in consequent instance right through history.⁵²³ The point here is not that the Biblical account is the source of current understanding; rather the principle of reparation has a long history and role.

In its secular sense, the evolution of reparations under international law traces back to the end of the First World War through the Versailles peace agreement, wherein a duty of reparations

⁵¹⁶ TIETEL, RG, Above n 365 at 119

⁵¹⁷ OETTE LUTZ. 2009. Reparations in Periods of Uncertain Transition: Lessons from Sudan. [online]. Available from the world Wide Web: <http://escolapau.uab.cat/img/programas/derecho/justicia/seminariojt/tex11.pdf>, p.1

⁵¹⁸ The International Centre for Transitional Justice and International Development Research Centre, “*Repairing the Past: Reparations and Transitions to Democracy: Perspectives from Policy, Practice and Academia*”, Symposium Summary, Ottawa, Canada, 11-12 March 2004. [online]. Available from the World Wide Web: http://www.ier.ma/IMG/pdf/REARATIONSymposium_report.pdf, p.1

⁵¹⁹ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 1-2

⁵²⁰ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2

⁵²¹ See TIETEL, RG, Above n 365, at 120 The Biblical reparation is related to the Exodus of the Israelites from Egypt (Genesis 15:13-14). Although subject to different interpretation, it is assumed that the Biblical reparation is associated with redress. Redress, according to the word’s origins, relates to the attire worn in public ceremonies, signifying distinct status. In its earliest usages in the middle ages, “redress” links attire, status and the restoration of dignity. It is argued that the stripping of Egyptians and the “re-dressing” of the Israelites signifies more than a material element, it is a setting a straight, a ceremonial redressing, a rehabilitation in the public eyes. This ancient symbolic aspect of reparatory measures is manifest in subsequent precedents throughout history.

⁵²² TIETEL, RG, Above n 365 at 120-121

⁵²³ TIETEL, RG, Above n 365 at 121

was imposed on Germany for its “total war guilt”.⁵²⁴ The concept of reparations was further developed at the end of the Second World War, giving rise to claims against Germany by victims and survivors of German executions.⁵²⁵ In the post World War II experience, the notion of reparation has significantly changed to include reparations for victims of violations of International Humanitarian Law and Human Rights Law.⁵²⁶

What does the practice tell us about reparation? Reparation has become a common form of addressing past violations irrespective of contextual differences. Clearly, “in contemporary times, most transitional regimes - whether following war, military dictatorships, or communism - have undertaken some form of reparatory justice, [and reparation] is widely prevalent, despite divergent legal cultures.”⁵²⁷ Apart from other forms of reparation, material reparations were tried and adopted in El Salvador, Guatemala, Haiti, Malawi, South Africa, Peru, Argentina, Brazil, and Chile by establishing different models for financing reparations programs.⁵²⁸ Hence, we see that reparation, including material reparation, has been used to address past violations.

In most of the countries abovementioned, reparation programs were part of truth and reconciliation processes, while in some it resulted from judicial processes.⁵²⁹ In some other countries, we have dual institutions; an example is Sierra Leone where a special tribunal for war crimes and a Truth and Reconciliation Commission tasked with recommending a series of measures, including reparation, was set up.⁵³⁰ Hence, the right to reparation may be addressed by adopting both judicial and non-judicial mechanisms.⁵³¹

One issue in relation to reparation is whether successor regimes have an obligation to redress past wrongs. We may note that ‘the threshold dilemma confronted by successor regimes in

⁵²⁴ TIETEL, RG, Above n 365 at 121-122

⁵²⁵ TIETEL, RG, Above n 365 at 122

⁵²⁶ TIETEL, RG, Above n 365 at 122-123

⁵²⁷ TIETEL, RG, Above n 365 at 119

⁵²⁸ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 6. Two models for financing reparations are provided. The first is the establishment of “a special fund through international resources, taxes, private sources, the sale of state assets, or the recovery of assets from perpetrators.” The second is financing reparations through “direct line items in state budgets and monies are channelled via the responsible ministry.”

⁵²⁹ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 6

⁵³⁰ LUTZ, Above n 517, at 1

⁵³¹ LUTZ, Above n 517, at 1. See also ERIK DOXTADER. 2004. *Reparation*, in CHARLES VILLAVICENCIO and ERIK DOXTADER (eds.). *Pieces of the Puzzle, Key Words on Reconciliation and Transitional Justice*. Cape Town : The Institute for Justice and Reconciliation, at 27-28

transitional periods is whether new regimes are obligated to redress victims of state wrongs”.⁵³² Tietel asserts that states have an explicit obligation under international law to repair.⁵³³ The obligation of states can be inferred from various international agreements including the 1948 Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights of 1966.⁵³⁴ The general obligations of states under these instruments are interpreted to give rise to the duty to provide reparations. More specifically, “states are legally obligated to provide adequate reparations to individuals for crimes against humanity, genocide, war crimes, and torture.”⁵³⁵ Here, the duty to repair is restricted to gross violations of international human rights law and international humanitarian law. We might say that the right to reparations is clearly established under the widely accepted international human rights instruments.⁵³⁶ Apart from the UDHR and ICCPR, these instruments include the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 14) and the Convention on the Rights of the Child (art. 39).⁵³⁷ Moreover, international humanitarian law, international criminal law and customary international law are cited as bases of a legal right to reparations impliedly imposing an obligation on states.⁵³⁸ Some writers discuss reparation in terms of rights, which of course impliedly impose obligations on states.⁵³⁹ Dr. Lutz Oette notes, “the right to reparations for victims of serious violations of human rights and gross violations of international humanitarian law is by now firmly established under international law.”⁵⁴⁰ No doubt, the right to reparations and duty to provide reparations do apply in transitional societies.⁵⁴¹ While, arguably, there is a duty to provide reparations under international law,

⁵³² TIETEL, RG, Above n 365 at 119

⁵³³ TIETEL, RG, Above n 365 at 119

⁵³⁴ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2

⁵³⁵ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2. It is suggested that the ideas of adequate reparations implies restitution in proportion to the harm; However, applying this criteria will not help as it cannot be realized, and hence it is recommended that reparations programs require the formulation of a different criteria.

⁵³⁶ Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Reparations Programmes, United Nations, New York and Geneva, 2008, HR/PUB/08/1, at 12. Available at <http://www.ohchr.org/Documents/Publications/ReparationsPrograms.pdf>

⁵³⁷ Office of the United Nations High Commissioner for Human Rights, Above n 536, at 12-13

⁵³⁸ Office of the United Nations High Commissioner for Human Rights, Above n 536, a 13

⁵³⁹ LUTZ, Above n 517

⁵⁴⁰ LUTZ, Above n 517 citing UN General Assembly Resolution, The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law. UN Doc.A/RES/60/147, 16 December 2005

⁵⁴¹ See LUTZ, Above n 517; TIETEL, RG, Above n 365; and also Office of the United Nations High Commissioner for Human Rights, Above n 536, at 17

the question of reparations is not entirely a legal one; rather it is both a legal and moral issue.⁵⁴²

Nevertheless, in light of specific constraints – for example resource constraints - a question arises whether states in transition should comply with international law:

While, under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparation for victims, implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. In this respect, national Governments possess a good deal of discretion and flexibility.⁵⁴³

Tietel is wary of the applicability of such obligation under national laws and suggests that the issue is more complicated; “raising conflicts between the back-ward looking purposes of compensating victims of past state abuses and the state’s forward-looking political interests.”⁵⁴⁴ This suggests the difficulty of making decisions, in light of financial/resource limitations, on whether state/public resources be spent to repair victims or to rebuild the society. This has led to the perception that “reparations are a luxury that only affluent countries can afford; too expensive for most countries emerging from authoritarian regimes or conflicts.”⁵⁴⁵ Financial, political and logistical matters may hinder any meaningful reparation so that it is better to allocate limited resources to other goals or objectives of transitional justice process.⁵⁴⁶ Thus is the dilemma transitional societies may face in determining whether to provide reparation:

Financing reparations often competes with other legitimate state-building goals, such as providing basic services, establishing accountable and transparent public bodies, and ensuring the physical safety of citizens.⁵⁴⁷

⁵⁴² Office of the United Nations High Commissioner for Human Rights, Above n 536, at 48

⁵⁴³ Office of the United Nations High Commissioner for Human Rights, Above n 536 at 14

⁵⁴⁴ TIETEL, RG, Above n 365 at 119

⁵⁴⁵ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2

⁵⁴⁶ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2

⁵⁴⁷ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 5

Hence, there is a debate on the allocation of resource. Moreover, a government's capacity to design and carry out a reparations policy is more limited where the socio-economic development of the society is low while the victims or potential claimants are many.⁵⁴⁸ The question of reparation also raises the "prospective/retrospective, individual/collective dilemmas characterizing transitional periods."⁵⁴⁹ Nevertheless, the difficulty in formulating reparation programs should not be taken as impossibility.⁵⁵⁰ Reparation is, arguably, the only direct benefit to victims and there is a legal obligation to provide reparation.⁵⁵¹ Thus, the suggestion is that, in both ordinary and transitional times, "reparatory justice is always in some sense backward looking, as it implies rectification of past wrongs."⁵⁵² Therefore, states should allocate some part of their resources to satisfy victims claim for reparation as a means of correcting the past.

In times of transition, the forward-looking processes or development alone should not be considered as an alternative to reparation.⁵⁵³ Hence, we might observe:

Development is an important factor in establishing sustainable economies, but it is also an entitlement that citizens receive because they are citizens, and not victims. In this process, the link between benefits and abuses is weakened and redress is undermined. Hence, it is imperative that reparations programs preserve the integrity of the link between a violation of rights and redress by the state.⁵⁵⁴

The importance of reparations as a retrospective measure to remedy victims for past violations is clear. However, this process of rectifying the past has also positive effects in

⁵⁴⁸Office of the United Nations High Commissioner for Human Rights, Above n 536, at 39

⁵⁴⁹TIETEL, RG, Above n 365 at 119. See the International Centre Symposium...p 5 for the debate over the individual-collective dimension of reparation programs. It is suggested that governments tend to prefer collective programs of reparations for its cost implications, the need to avoid the difficulty of defining beneficiaries or reparations as well as the need to provide reparation in-kind services

⁵⁵⁰ The International Centre for Transitional Justice and International Development Research Centre, Above n 518

⁵⁵¹ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 2. Arguably, we might say "the benefits that victims receive from jailing perpetrators are much more indirect than those they would receive from reparations." It is again suggested that "other transitional mechanisms can have a reparative effect, but from the standpoint of victims, reparations play a special role."

⁵⁵² TIETEL, RG, Above n 365 at 119

⁵⁵³ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 5

⁵⁵⁴ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 5

creating the foundations for a better future.⁵⁵⁵ It is suggested, “transitional reparatory measures mediate repair of victims and communities, past and present, laying a basis for redistributive policies associated with radical upheaval.”⁵⁵⁶ It is also noted that “transitional reparatory justice reconciles the apparent dilemma in the extraordinary context of balancing corrective aims, transitional reparatory justice mediates individual and collective liability, shaping the political identity of the liberalizing state.”⁵⁵⁷

Thus, we see reparations, as a form of justice for victims, can promote transition to democracy. In this respect, it is noted, “justice for victims can contribute to establishing the foundations of an inclusive and democratic state.”⁵⁵⁸ Reparation may, by righting past wrongs, contribute to the efforts to build a better future. As clearly noted, “in the wake of systemic political violence, atrocity and gross violations of human rights, reparation is a transitional instrument that acknowledges the offenses of the past and provides a basis for building a new future.”⁵⁵⁹ Hence, it ‘...both compensates and promises.’⁵⁶⁰ Reparation therefore rectifies past wrongs; it compensates/restores victims while serving, at the same time, as a foundation for a better future. This future begins with an acknowledgement of the past, and this in itself demonstrates a departure from the past and a promise that similar wrongs will not occur again.

Reparation thus serves as a form of restorative justice. As Eric Doxtader notes:

Reparations may serve the ends of restorative justice...; [because] the concern is for the question of how material and symbolic compensation can work to acknowledge the wounds of the past, restore human dignity and create platforms for collective (re)integration and nation building.⁵⁶¹

⁵⁵⁵ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 5. We may observe, “justice for victims can contribute to establishing the foundations of an inclusive and democratic state.”

⁵⁵⁶ TIETEL, RG, Above n 365 at 119-120

⁵⁵⁷ TIETEL, RG, Above n 365 at 119

⁵⁵⁸ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 5

⁵⁵⁹ DOXTADER, Above n 531, at 25

⁵⁶⁰ DOXTADER, Above n 531, at 25

⁵⁶¹ DOXTADER, Above n 531, at 27

Reparation can therefore serve to promote national consensus and unity. In its restorative sense, reparation can contribute to “the process of transforming a divided society into one that has the capacity to build a sense of common good and collective unity.”⁵⁶² This implies the contribution of reparation to reconciliation. We may note, “a restorative model of reparation may heal better than its legal counterpart to the degree it offers victims a chance to express publicly the experience of their suffering and their perceptions about how it is best redressed in relation to the present.”⁵⁶³ Reparation, it is also argued, may prevent resort to retribution.⁵⁶⁴

Due to the many interrelated benefits identified above, a reparations policy, it could be argued should be part of a transitional justice process. However, in light of massive violations and resource constraints as well as other tasks such as nation building or development, providing a reparation policy may be difficult. Again, we might stress, “the level of difficulty is not a legitimate excuse of governments to avoid their legal and moral obligation to provide redress to victims.”⁵⁶⁵ The process has to face the challenges of “confronting the hidden and often contentious truth of history; reparation depends on reaching agreements about what harm has been done and how it is best redressed.”⁵⁶⁶ As already indicated, a society in transition has to make decisions on various issues related to reparations.

Generally, we can understand that reparation is intertwined with other objectives of transitional justice. It is part of the general conception of justice, and related to truth as well as reconciliation. Some may argue that true reconciliation comes with reparation.⁵⁶⁷ Considering the inter-relationship between the different elements of transitional justice, some

⁵⁶² DOXTADER, Above n 531, at 27

⁵⁶³ DOXTADER, Above n 531, at 27-28

⁵⁶⁴ DOXTADER, Above n 531, at 26. Doxtader notes reparation serves as “an alternative to retribution, particularly in situations where reparation functions as a counterpart to amnesty, and when a new government undertakes to repair the damage done by its predecessor; in any event reparation focuses attention on how the past bears on the present and what actions are needed to move to the future.

⁵⁶⁵ The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 6

⁵⁶⁶ DOXTADER, Above n 531, at 26

⁵⁶⁷ See VAN ZYL, Above n 503, at 16. It is noted, “certain South African parties stress that reconciliation will only occur once black citizens are adequately compensated for years of discrimination in the areas of health care, housing and education. Others argue that a preoccupation with past injustices is an obstacle to reconciliation, and a unified nation can only be built by focusing on the future. Still others argue that the return of land from which Africans were forcefully removed is central to reconciliation...”, pp. 16-17

argue that a stand-alone reparations program with no links to other components of transitional justice would likely fail:⁵⁶⁸

Victims may perceive monetary compensation without parallel efforts to document the truth or prosecute offenders as insincere or worse, the payment of blood money. Conversely, truth-telling processes without reparations can also seem insincere to victims.⁵⁶⁹

Clearly, there is a need to link reparations to other transitional justice processes. Reparations might be successful if seen as a component of a broader or holistic justice process.⁵⁷⁰ Hence, reparations programs need to be “externally coherent, i.e. part of a holistic justice strategy.”⁵⁷¹ Therefore, in addressing past violations, societies may need to devise appropriate reparations plan with an understanding of reparations as part of a comprehensive or holistic policy of justice. In the Ethiopian context, the SPO proclamation did not contain any provision on reparations. The closest measure that the transitional government adopted was the restitution of property rights to those who were arbitrarily deprived of their property by the Dergue.⁵⁷² These measures of restitution were endorsed by separate legal instruments and arguably form part of reparations. Nevertheless, they are very much restricted to specific violations of property rights and the scope of their implementation is questionable. Thus, the transitional justice framework in Ethiopia contains no clear and adequate policy for victims’ reparation.⁵⁷³ The reasons for the lack of reparatory programs and the implications thereof will be addressed in the analytical chapters on the Ethiopian transition.

4.5 Reconciliation

⁵⁶⁸The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 3

⁵⁶⁹The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 3

⁵⁷⁰Office of the United Nations High Commissioner for Human Rights, Above n 536, at 19

⁵⁷¹The International Centre for Transitional Justice and International Development Research Centre, Above n 518, at 3

⁵⁷²See Proclamation No. 110/95; a proclamation for the review of illegally taken properties.

⁵⁷³ However, certain measures taken earlier may also be considered as moral reparation. These includes search for the body and proper burial of victims of past atrocities, the establishment of memorial museum in Addis Ababa for victims of red terror, and other memorial services.

Reconciliation has come to be recognized as an essential component of transitional justice processes. It has become an integral part of discussions in search of solutions during transition. The conviction is that reconciliation is the ultimate solution to cycles of violence and repression, instability and social disintegration.⁵⁷⁴ Hence, all processes of transitional justice be it prosecution, truth-telling/recording, reparations or institutional reforms are meant to promote reconciliation. This section provides a brief discussion on some of the issues surrounding reconciliation including the meaning and significance of reconciliation, and its relationship to other components of transitional justice and the processes and mechanisms for achieving reconciliation. As reconciliation is such a broad concept, this section only attempts to present some of the key points and issues.

4.5.1 The Meaning and significance of Reconciliation

What is the meaning of reconciliation? Some writers have warned against any general definition of reconciliation or the proposition of a formula for achieving it.⁵⁷⁵ These warnings are meant to allow for contextual meanings and processes of reconciliation. Although the contextual meaning may matter in consideration of specific process of reconciliation, some general understanding about its possible meaning (s) or its attributes are nevertheless important.

The term ‘to reconcile’ has diverse meanings giving rise to various features of reconciliation used in different and unique contexts.⁵⁷⁶ These include; (1) to be friendly with (someone) after estrangement or re-establish friendly relations between (two or more people), (2) to settle (a quarrel), (3) to make (oneself or another) no longer opposed to something, (4) to cause to acquiesce in something unpleasant, and (5) to make (two apparently conflicting things) compatible or consistent with each other.⁵⁷⁷ However, all of them seem to relate to reconciliation at an individual level.⁵⁷⁸ In its social and political dimension, reconciliation

⁵⁷⁴ MOBBEK, E, Above n 315 at 262. One might argue, “reconciliation is the ultimate objective in all post-conflict societies and post conflict reconstructions processes.” Arguably, the same is true in societies emerging out of authoritarian or repressive regimes.

⁵⁷⁵ CHARLES VILLA-VICENCIO, ‘*Reconciliation*’, In VILLA-VICENCIO, C, and DOXTADER, E,(eds.). 2004. *Pieces of the puzzle: Keywords on Reconciliation and Transitional Justice*. Cape Town: Institute for Justice and Reconciliation, at 5

⁵⁷⁶ PANKHURST, D, Above n 329 at 254

⁵⁷⁷ PANKHURST, D, Above n 329 at 254

⁵⁷⁸ PANKHURST, D, Above n 329 at 240.

takes a different meaning and feature.⁵⁷⁹ For Donna Pankhurst, reconciliation has different meanings depending on whether we are talking about it from an individual or political/social sense.

Apart from the above linguistic definition, some writers have provided conceptual definitions of reconciliation. Reconciliation has been defined differently “as acknowledgement and repentance from perpetrators, and forgiveness from the victims, as non-lethal co-existence, as democratic decision-making and reintegration, and as encompassing four concepts namely, truth, mercy, peace and justice.”⁵⁸⁰ Nevertheless, these definitions are unclear and include concepts, which are hard to define.

Kimberly Theidon asserts that “reconciliation is multidimensional; the individual with him or herself, members of the community with one another, between communities or states; between the individual and his or her gods, and between civil society sectors and the state.”⁵⁸¹ Thus, Theidon distinguishes between vertical and horizontal reconciliation.⁵⁸² We might ask, what is the logical relation between Pankhurst’s classification and that of Theidon? However, a distinction is made between national reconciliation and individual reconciliation. We might say, “national reconciliation is achieved when societal and political processes function and develop without reverting to previous patterns or the framework of the conflict.”⁵⁸³ On the other hand, individual reconciliation “is the ability of each human being to conduct their lives in a similar manner as prior to the conflict without fear or hate.”⁵⁸⁴ This distinction may have important implications on the goals and mechanisms of achieving reconciliation. Apparently, reconciliation in transitional societies has two important and interrelated aspects. First, it relates to reconciliation between the various (often-conflicting) sectors of the population in terms of the past conflict. Secondly, it relates to reconciliation of the present with the past as a means of enabling a consensual future.

The mechanisms of achieving reconciliation at an individual level may be different from that of national reconciliation and vice versa. In this respect, Pankhurst noted that:

⁵⁷⁹ PANKHURST, D, Above n 329 at 240

⁵⁸⁰ MOBBEK, E, Above n 315 at 262-263

⁵⁸¹ KIMBERLY THEIDON. 2006. *Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru*, The Journal of Conflict Resolution, **50** (3), p.454

⁵⁸² THEIDON, K, Above n 581 at 454

⁵⁸³ MOBBEK, E, Above n 315 at 263

⁵⁸⁴ MOBBEK, E, Above n 315 at 263

What is required psychologically for an individual to recover from trauma and be reconciled with the past need bear no resemblance to what might be required for a society to do so, even though it is not uncommon for people to expect that individuals and society as a whole should all be able to achieve reconciliation (some sort) through the same set of centralized process.⁵⁸⁵

The process for political reconciliation might be different from that of individual reconciliation although the latter can possibly be expected of the former processes. In this respect, a relevant question is whether political reconciliation can be achieved with out achieving individual reconciliation or vice versa. Is there a conflict between the two? Indeed, some argue that not only is this possible, but also argue, “national reconciliation may come at the expense of reconciliation at the individual level.”⁵⁸⁶ The implication is that political reconciliation processes may be promoted without healing individuals’ traumas.⁵⁸⁷ However, one may question the long-term effect of such processes in the absence of other mechanisms. Arguably, individual reconciliation can take place without national reconciliation.⁵⁸⁸

Diverse forms of conflicts may require distinct types and methods of reconciliation.⁵⁸⁹ On the one hand, “[a]t individual and interpersonal levels, reconciliation may require the healing of deep psychological and emotional wounds.”⁵⁹⁰ On the other hand, “[p]olitical reconciliation demands a different focus, one that involves less forgiveness than a desire and opportunity for sustained and meaningful interaction.”⁵⁹¹ Hence, different transitional justice methods may uphold different forms of reconciliations. We should also note that some transitional justice processes might advance primarily one form of reconciliation over others.⁵⁹²

Thus, we see, uncertainties remain regarding the relationship between justice and reconciliation. Often, reconciliation is considered as irreconcilable with justice.⁵⁹³ Although

⁵⁸⁵ PANKHURST, D, Above n 329 at 240-241

⁵⁸⁶ MOBBEK, E, Above n 315 at 263

⁵⁸⁷ MOBBEK, E, Above n 315 at 263

⁵⁸⁸ MOBBEK, E, Above n 315 at 263

⁵⁸⁹ VILLA-VICENCIO, Above n 575 at 3

⁵⁹⁰ VILLA-VICENCIO, Above n 575 at 3

⁵⁹¹ VILLA-VICENCIO, Above n 575 at P. 3-4

⁵⁹² MOBBEK, E, Above n 315 at 263

⁵⁹³ MOBBEK, E, Above n 315 at 263

the preceding section partly addressed this issue of compatibility, it is useful to provide certain points highlighting the nexus between the two.

Charles Villa Vicencio argues that there is a natural correlation between justice and reconciliation.⁵⁹⁴ He asserts that:

It is unrealistic to ask victims and survivors of gross violations of human rights to reconcile in the absence of justice. It is at the same time necessary to broaden the understanding of justice to include realistic options for the building of civic trust, the promotion of a human rights culture and the pursuit of economic transformation.⁵⁹⁵

Hence, the argument is that justice is a necessary precondition for reconciliation. In other words, reconciliation without justice cannot be expected. However, a broader understanding of justice is not only compatible with but also a precondition for reconciliation. A reconciliation process may consider “justice as an essential ingredient to any settlement, while recognizing that there are different ways of achieving and understanding justice.”⁵⁹⁶ This is an argument for a comprehensive or holistic notion of justice.⁵⁹⁷

However, a further question arises as to whether a more specific notion of justice, for example criminal justice, is compatible with reconciliation. The issue is more broadly summarised as follows:

The justice versus reconciliation, justice versus peace, justice versus truth debates all emphasise that justice is retributive and reconciliation is restorative and that there is a trade-off.⁵⁹⁸

The debate about justice versus reconciliation assumes that justice is retributive, involving criminal proceedings intended to establish individual guilt and impose punishment, and thus such a notion of justice will not lead to reconciliation or other desirable goals.⁵⁹⁹ However, it

⁵⁹⁴ VILLA-VICENCIO, Above n 575 at 3. Arguably, “justice and reconciliation are inherently and inextricably linked.”

⁵⁹⁵ VILLA-VICENCIO, Above n 575 at 3

⁵⁹⁶ VILLA-VICENCIO, Above n 575 at 4

⁵⁹⁷ VILLA-VICENCIO, Above n 575 at 3

⁵⁹⁸ MOBBEK, E, Above n 315 at 263

⁵⁹⁹ MOBBEK, E, Above n 315 at 263-264

may be argued that even this notion of criminal justice may contribute to reconciliation rather than hinder it, especially in light of the complementary nature of transitional justice processes.⁶⁰⁰ A freestanding retributive justice, like other processes, may not help in promoting reconciliation. Hence, the point here is that criminal justice, perhaps retributive justice, is compatible with and encourage reconciliation if it is considered with and implemented alongside other transitional justice processes. Therefore, the context may be what matters most.

In this connection, it is important to consider the connection between truth and reconciliation commissions, or truth commissions, and reconciliation. Are such commissions better suited to promote reconciliation? There might be “an underlying assumption that truth commissions are a path to reconciliation and peace for all post-conflict societies, and that they are to be preferred to other institutional justice mechanisms.”⁶⁰¹ Although such commissions, some with reconciliation attached to their nomenclature, have some advantages as a means to achieve reconciliation, they also have limitations and their success is contextual, and they cannot be prescribed for all societies in transition.⁶⁰² Hence, what is emphasised is the importance of adopting various mechanisms and processes that would ultimately lead to reconciliation.

As already discussed, reconciliation is an essential component if not the ultimate objective, of transitional justice processes. Both individual and national reconciliation may be crucial. The importance of national or political reconciliation is underlined as follows:

In societies emerging from violent conflict, political reconciliation is not a romantic or utopian ideal; it is often the only realistic alternative to enduring and escalating violence, and a vital means of building a society based on the rule of law and social reconstruction.⁶⁰³

This stresses the significance of political reconciliation in ending violence or cycles of violence and building a better society. Nevertheless, a question arises whether political

⁶⁰⁰MOBBEK, E, Above n 315 at 264. It is noted, “Certain mechanisms of retributive justice, as well as restorative justice, can support reconciliation in particular contexts. It is the complementary characteristics that will be emphasised, and how this can lead to sustainable long-term peace.”

⁶⁰¹MOBBEK, E, Above n 315 at 265

⁶⁰²See MOBBEK, E, Above n 315 at 265-271.

⁶⁰³VILLA-VICENCIO, Above n 575 at 3

reconciliation, without individual reconciliation, would achieve that purpose. Societies in transition face difficult questions in formulating reconciliation level and processes.

However, reconciliation as a worthwhile goal is also questionable. According to some writers, people may consider “reconciliation or restoration as meaningless.”⁶⁰⁴ As clearly noted:

[Some people may] have no tangible memory of peace - nothing to restore or return; for many, the reality of suffering is too raw to contemplate the possibility of reconciliation; while others simply resolve never to reconcile.⁶⁰⁵

As indicated earlier, individual reconciliation helps each individual to pursue his /her lives in a similar manner before the conflict or repressive regime free of fear or hate, which implies restoring life to some previous normal situation. In this sense, reconciliation may restore normalcy. Would such be possible if societies endured successive cycles of conflict and repression? How far can one go back and remember the good old days, which the living members of society never experienced? In such contexts, reconciliation may only be pursued not as restoring but as creating new social relationship. Hence, the second aspect of reconciliation – reconciliation of the present with the past as a means of enabling a consensual future – appears more appropriate. The other difficulty is the freshness of suffering in peoples’ minds making reconciliation at least difficult if not impossible. Hence, a question arises as to whether some time has to pass or other processes be taken for reconciliation to be effected. These all seem to highlight the challenges for reconciliation without entirely discrediting reconciliation per se. Nevertheless, there might be situations where people decide not to reconcile, not to forgive perpetrators, and this may hinder effective reconciliation.

Reconciliation is usually premised on an acknowledgement and repentance on the part of perpetrators, and readiness to forgive on the part of victims or society. Reconciliation cannot occur, even if perpetrators acknowledge and repent, unless there is forgiveness. Some may reject forgiveness. The former President of Peru is reported to have stated “ El Peru will never forgive, will never forget, and will never pardon that which it has suffered and that

⁶⁰⁴VILLA-VICENCIO, Above n 575 at 3

⁶⁰⁵VILLA-VICENCIO, Above n 575 at 3

which it has lived.”⁶⁰⁶ Theidon seems to argue that such a rejection of reconciliation on the part of the political elite while the local population is ready is unreasonable.⁶⁰⁷ Sometimes even those (‘victims and survivors’) who believe in the possibility of reconciliation usually assert that justice must precede reconciliation.⁶⁰⁸

A question thus arises regarding the role of forgiveness in reconciliation processes. We might say that “forgiveness has entered the political domain where there is a need to ameliorate historical injustices, overcome political scandals, and facilitate democratic transition.”⁶⁰⁹ Here, we are concerned with the role of forgiveness in transitional societies and in its relation with reconciliation. Opinions on the role of forgiveness vary.

It is important, first, to consider the meaning or definition of forgiveness. Although various meanings are suggested, forgiveness can be defined “as a negation or abandonment of vengeance.”⁶¹⁰ Similarly, forgiveness is seen as “the overcoming of feelings of revenge, moral hatred, indignation or some other feelings that are related to anger.”⁶¹¹ These notions of forgiveness relate to the victims’ behaviour to abstain from something, and are characterized as a unilateral understanding of forgiveness.⁶¹² Most writers uphold a bilateral notion of forgiveness, according to which certain acts of the perpetrator are a precondition for the victims’ forgiveness.⁶¹³ Although this bilateral conception may be problematic⁶¹⁴, it stresses the conditionality of forgiveness.

It is, however, noted that forgiveness is not always essential to reconciliation.⁶¹⁵ This argument rests on the distinction between individual reconciliation and political reconciliation, and suggests that political reconciliation is possible without

⁶⁰⁶Former President Alan Garcia, in testimony before TRC, June 12, 2003 cited in THEIDON, K, Above n 581 at 454

⁶⁰⁷THEIDON, K, Above n 581 at 454

⁶⁰⁸VILLA-VICENCIO, Above n 575 at 3

⁶⁰⁹ROMAN DAVID, and SUSANNEY P.CHOI. 2006. *Forgiveness and Transitional Justice in the Czech Republic*, Journal of Conflict Resolution, **50** (3), Sage publications, p. 339

⁶¹⁰DAVID and CHOI, Above n 609 at 339-340

⁶¹¹NEELKE DOORN. 2008. *Forgiveness and Reconciliation in Transitional Justice Practices*. Ethical Perspectives, Centre for Ethics, Radboud Universiteit Nijmegen, **15** (3), at 383

⁶¹²DOORN, N, Above n 611 at 383

⁶¹³DOORN, N, Above n 611 at 383. These acts include acknowledgement, repentance, and accountability.

⁶¹⁴DOORN, N, Above n 611 at 383. The problem relates to the difficult of applying this notion to collective (national) reconciliation. See pp.381-398

⁶¹⁵VILLA-VICENCIO, Above n 575 at 6. It is suggested, ‘reconciliation does not necessarily involve forgiveness.’

forgiveness.⁶¹⁶ What is important is the desire and opportunity for sustained and meaningful interaction. By indicating the problems of forgiveness in transitional societies, some accounts provide the possibility of reconciliation without forgiveness.⁶¹⁷ Others note the limitations of forgiveness. Although forgiveness is considered as instrumental in securing the whole truth, this result may not be achieved. In this respect, we might note that “forgiveness is often presented as the price people ought to pay for revelations of truth, and the ambition to create a single, complete, common truth from all accounts is rarely hoped for let alone achieved.”⁶¹⁸ Arguably, the South African TRC has come closest to achieve this ambitious aim.⁶¹⁹ Still, whether forgiveness or conditional forgiveness, through the acts of disclosure and acknowledgement by the wrongdoer, may contribute to a complete narration of the past is contestable. Nevertheless, the importance of forgiveness can be understood from the observation that “certainly the absence of some process of public truth-telling is a major inhibition to reconciliation, and therefore at least to long-term or positive peace...”⁶²⁰ Thus, the argument is that as truth telling is essential for reconciliation, impliedly forgiveness is important for some sort of truth telling.

However, irrespective of the above questioning of forgiveness, the widely held opinion is that forgiveness is an important element for reconciliation. Reconciliation may depend on the disclosure of truth and forgiveness to perpetrators. It is asserted that “forgiveness helps to overcome inter human alienation and repair fractured human relations.”⁶²¹ This assertion seems to relate to individual reconciliation. Moreover, it is suggested that “in the macro political context, forgiveness is championed as a means to peace and national reconciliation in the aftermath of political conflicts.”⁶²² Thus, the importance of forgiveness in promoting both individual and national or political reconciliation is clear.

Forgiveness may benefit all, as David and Choi argue:

Forgiveness benefits victims, perpetrators, and divided societies; it can end cycles of violence, help victims and re-establish their identity, redeem wrongdoers as persons

⁶¹⁶ VILLA-VICENCIO, Above n 575 at 6

⁶¹⁷ DOORN, N, Above n 611 at 381-398

⁶¹⁸ PANKHURST, D, Above n 329 at 241

⁶¹⁹ PANKHURST, D, Above n 329 at 241

⁶²⁰ PANKHURST, D, Above n 329 at 241

⁶²¹ DAVID and CHOI, Above n 609 at 340

⁶²² DAVID and CHOI, Above n 609 at 340

worthy of forgiveness, renew civil relationships between victims and perpetrators, and allow bystanders to realize their own roles in the past.⁶²³

The above assertion points to the multiple significance of forgiveness for various members of society. Moreover, it may “help societies to overcome though not forget, the past and thus make possible progress to the future.”⁶²⁴ These benefits of forgiveness arguably form the bedrock of reconciliation.

Arguments in support of forgiveness as a component of reconciliation are abundant. It is suggested “...the South African political transition endorsed the principle of ‘no future without forgiveness.’”⁶²⁵ Similarly, based on the experiences of local communities in Peru, Theidon asserts that, “apology, the administration of justice, and dialogues are very important steps in the reconstruction of co-existence - what villagers mean when they refer to reconciliation.”⁶²⁶ Here, it is possible to see the relevance of not only forgiveness but also of justice, reaffirming earlier arguments. Dialogue plays a crucial role in promoting reconciliation processes.

Another important set of issues in relation to forgiveness include who has the right to forgive - the state or victims, and what policies can be devised to promote forgiveness and reconciliation? These questions are beyond the scope of this present study. However, it is essential to note that forgiveness or reconciliation should not be imposed on victims, rather it should be built.

Although the South African Truth and Reconciliation Commission was praised for its achievements, it has not escaped strong criticisms. For example, the process has been criticized for “deploying reconciliation in a top-down direction, leaving scant space to speak about the sentiments of retribution and vengeance that characterized the local level; the gap between national and local processes was notable.”⁶²⁷ As Wilson argues, “political and religious elites appropriated the term *reconciliation* as a meta narrative for reconstructing the

⁶²³ DAVID and CHOI, Above n 609 at 340

⁶²⁴ DAVID and CHOI, Above n 609 at 340

⁶²⁵ DAVID and CHOI, Above n 609 at 339

⁶²⁶ THEIDON, K, Above n 581 at 454

⁶²⁷ THEIDON, K, Above n 581 at 454

nation-state and their hegemony following the apartheid regime.”⁶²⁸ Based on the experiences in South Africa and Namibia, Donna Pankhurst argues, “reconciliation was forced on the poor [or victims] and has brought few, if any, benefits; or they are being forced into forgiveness, as part of reconciliation, against their will.”⁶²⁹ These criticisms remind us that appropriate policies of reconciliation or forgiveness are necessary; otherwise, it will be counterproductive. One essential point in this respect is the need to adopt a holistic process of dealing with the past, processes that would ensure justice, truth telling, reparations and institutional reform that together will lead to reconciliation and a better future.

Another important reminder is that “...reconciliation does not provide an immediate or quick solution to the problems facing the nation, and involves a willingness to work together with one’s enemies and adversaries in the common pursuit of a solution that is not yet in hand.”⁶³⁰ Thus, there is a need to understand reconciliation as both a process and an end. In this connection, Villa-Vicencio reminds us “reconciliation holds the beginning of civic trust, willingness to talk, a capacity to listen and a readiness to take cautious risks.”⁶³¹ We should also be noted that reconciliation requires the fulfilment of diverse needs through diverse mechanisms. Arguably, therefore, reconciliation can rarely result from one particular mechanism of transitional justice.⁶³² Thus, as Mobbek suggests a holistic approach, a mixture of diverse mechanisms of justice, “will have a greater probability of achieving the rather large objective of reconciliation, at both the national and individual levels.”⁶³³

Before concluding this section, it is necessary to note that reconciliation was not explicitly made part of the Ethiopian transitional justice processes. As will be elaborated in the following chapters, the Ethiopian transitional processes did not incorporated reconciliation as one of its goals. Hence, in light of the significance of reconciliation, the implication of this exclusion of reconciliation indeed appears to be enormous in today’s political life in Ethiopia as manifested in mutual suspicion and mistrust, unwillingness to work together or to talk to each other, the polarization of politics, and the prevalence of political extremism. This is the subject of the analysis of the Ethiopian transitional justice processes in the next chapter.

⁶²⁸ THEIDON, K, Above n 581 at 454

⁶²⁹ PANKHURST, D, Above n 329 at 240

⁶³⁰ VILLA-VICENCIO, Above n 575 at 4

⁶³¹ VILLA-VICENCIO, Above n 575 at 4

⁶³² MOBBEK, E, Above n 306 at 315

⁶³³ MOBBEK, E, Above n 306 at 315

Concluding Remarks

This chapter has presented a discussion on the main components of transitional justice including their meaning, significance and mechanism of achieving them. Justice, we observed, is a controversial subject matter, and more so in the context of transitional periods. A broader understanding of justice is suggested, with the implication that societies in transition may adopt a variety of mechanism to realize it. An interesting issue in formulating a certain conception of justice and justice process relates to the notion of justice motivations. An enquiry into these motivations may help to evaluate whether transitional justice processes, including the Ethiopian one, are motivated by reason, emotion or self-interest. The idea of political-legal justice may also be useful in understanding and explaining certain transitional justice processes. Criminal prosecutions as a process of achieving justice has given rise to important debates. These discussions and debates are relevant for the analysis of the Ethiopian transitional justice process. Based on the foregoing discussion, this study addresses two important questions: (1) what conception of justice and justice process was adopted in Ethiopia? And (2) was justice done? These questions and their implications are addressed in the next chapter (Chapter 5).

The main issues and debates related to truth were also considered, particularly on the meaning, significance and processes of establishing the truth as well as the suitability of criminal justice process to the search for and discovery of the truth. Based on this discussion, this study raises the questions (1) what does the Ethiopian transitional justice framework say about truth?, and (2) was the truth established?. These issues of truth in the Ethiopian context are addressed under chapter 6 together with the implications thereof.

While reparation may be considered as part of justice, this chapter provided a separate discussion on the meaning, significance, and the challenges to effective reparations program. This study raises two questions regarding the Ethiopian transition: (1) whether there was a policy of reparation?, and (2) What are the implications of the decision taken?. However, an overview of the Ethiopian transitional framework reveals the absence of adequate policy for reparations, and hence the discussion on reparation is incorporated into the analytical discussion on justice. The last section of this chapter addressed the issue of reconciliation as the ultimate objective of transitional justice processes. In view of this, the question of

reconciliation in the Ethiopian context is analyzed in the subsequent chapters. As already noted, the Ethiopian transitional justice process did not incorporate a policy of reconciliation, and hence the main questions are (1) whether reconciliation should have been pursued?, and (2) what is the implication of its absence from the transitional process?

By way of conclusion to this chapter, it is worth repeating that this study considers the foregoing four elements as interrelated components of transitional justice process. Thus, it is difficult, even undesirable to pick each one of them and discuss separately. The analytical part of this study, therefore, treats them jointly. The discussion on justice also deals with the question of truth, reparation and reconciliation together with the implications that follow. Nevertheless, for purpose of clarity and better presentation of data and analysis, the subsequent chapters examine justice and truth independently because these two components are specifically incorporated into the Ethiopian transitional justice process. To this analysis we now turn.

CHAPTER FIVE: INTERROGATING JUSTICE IN THE ETHIOPIAN TRANSITION

5.1 Introduction

This chapter investigates whether the Ethiopian transitional modality of dealing with the past was properly designed to serve the interest of justice and whether it was in fact successful in actually rendering it. The inquiry focuses on both the beginning and the end. It does not discuss in detail the processes involved in between unless such becomes relevant for the analysis of the framework or actualization of the objective of the process. This chapter has two sections. The first deals with the framework. This begins with a brief analysis of the legal framework adopted in Ethiopia, then presents a brief description of the trials, and ultimately interrogates the legal framework. The second section addresses whether the transitional process has achieved its objective of rendering justice.

5.2 The Legal Framework and the Trial

This section has three sub-sections; the first presents the transitional framework as contained in the SPO establishment proclamation while the second provides an overview of the Ethiopian trial processes, serving as a background for the last section that analyzes the appropriateness of prosecution based on the available data.

5.2.1 Understanding the Legal Framework

This sub-section discusses the legal framework for addressing the issue of justice in the transitional process in Ethiopia. As already discussed, the SPO was the central institution for supervising processes of accountability in Ethiopia. Thus, we now turn to examine the SPO establishment proclamation in detail.

After describing the violations and wrongs committed by the Dergue in its first three paragraphs, the preamble of the Proclamation asserts the need to bring the perpetrators of the previously mentioned violations to justice as follows:

*...in view of the fact that the historical mission of the Ethiopian people's Revolutionary Democratic Front (EPRDF) has been accomplished, it is essential that higher officials of the WPE and members of the security forces and armed forces who have been detained at the time of the EPRDF assumed control of the country and thereafter and who are suspected of having committed offences, as well as representatives of urban dwellers and peasant associations, and other persons who have associated with the commission of said offences, must be brought to trial.*⁶³⁴

Clearly, bringing suspects to trial was deemed necessary. That was quite simply the main objective of the proclamation.⁶³⁵ In this connection, paragraph six of the preamble and Article 6 of the proclamation set out the central task of the SPO in the transitional process:

*...it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct prompt investigation and bring detainees as well as those persons who are responsible for having committed offences and are at large with in and with out the country*⁶³⁶

We might say it is the necessity of bringing suspects to justice that led to the establishment of the SPO under the operative provisions of the proclamation.⁶³⁷ It is also worth noting that this essential institution was accountable to the highest executive body of the transitional government – the Prime Minister.⁶³⁸

⁶³⁴ *Proclamation for the Establishment of the Office of Special Prosecutor*. Proclamation No. 22/1992, Federal Nagarit Gazette, 1st Year, No.18, August 8/1992; Paragraph 4. It is worth noting here that the proclamation talks of the “historic mission of EPRDF”. Thus, we might ask the extent to which the transitional process was shaped by EPRDF’s perception of justice and construction of the past.

⁶³⁵ As noted in chapter four, criminal prosecution is one mechanism of rendering justice, and is often associated with the notion of retributive justice, with its emphasis on punishment. This suggests that the Ethiopian transitional justice process adopted a retributive notion of justice. However, this does not necessarily point to a motivation of revenge or vengeance as prosecution and trial may also serve other purposes including deterrence. Whether the adoption of this notion of justice was appropriate will be addressed in the next section.

⁶³⁶ Proclamation No. 22/1992, Above n 634; Paragraph 6

⁶³⁷ Proclamation No. 22/1992, Above n 634; see Article 2, sub article 1

⁶³⁸ Proclamation No. 22/1992, Above n 634; see Article 2, sub article 2

As already noted, the legal mandate of the SPO to bring suspects to courts is specifically provided under the proclamation.⁶³⁹ Thus, an understanding of the types of crimes/offences that fall under the mandate of the SPO is important. Although there are descriptions of the types and severity of crimes committed by the Dergue in the preamble, the investigative and prosecutorial mandate of the SPO extends to any crime. In other words, there is no limitation on the type and degree of offences.

Clearly, the SPO was established as an ad hoc institution rather than a permanent one. Article 4 of the proclamation states that ‘the *term of the Office shall terminate up on accomplishment of its task*’.⁶⁴⁰ From this, it is clear that the Office was not established as a permanent institution. The permanent organ of prosecution is the Office of Prosecution within the Ministry of Justice. Thus, the SPO is an ad hoc institution for investigation and prosecution of crimes committed by specific group of persons within a defined context. However, the office was also tasked with establishing and recording the truth of the past by the preamble of the proclamation, which provides that:

...It is in the interest of a just historical obligation to record for posterity the brutal offences...perpetrated against the people of Ethiopia...⁶⁴¹

An obvious question that arises is when exactly might we determine that these tasks have been accomplished?

Another important aspect of the legal framework is the qualifications for and the procedures of appointment provided under article 5 and article 3 respectively. The qualifications for appointment are particularly interesting as the proclamation stated that;

Any Ethiopian citizen who:

- (1) is faithful to the Transitional Period Charter of Ethiopia;*
- (2) is either trained in law or has acquired broad legal skill through experience and capable of rendering proper decision based on law;*

⁶³⁹ Proclamation No. 22/1992, Above n 634. Article 6 states “the Office shall, in accordance with the law, have the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Derg-WPE regime.”

⁶⁴⁰ Proclamation No. 22/1992, Above n 634; Article 4

⁶⁴¹ Ibid, paragraph 5 of the preamble

- (3) *has distinguished himself by his diligence, integrity and good conduct and has not, in any way, participated in the offences to be prosecuted by the Special Public Prosecutors; and*
- (4) *was not a member of the WPE or of the security force ;may be appointed as a Special Public Prosecutor.*⁶⁴²

It is worth noting that these criteria are cumulative in the sense that one has to fulfil all of them to qualify. These criteria may be categorized into positive conditions and negative conditions. The positive conditions are those qualities that a candidate should possess and include faithfulness to the Charter, legal competence, diligence, integrity and good conduct. A person cannot be appointed without such qualities. The negative conditions are those the candidate should not possess, and this includes participation in the offences falling under the mandate of the SPO and membership in the WPE or security force. Thus, participation in the specified offences and/or membership in the WPE or the security force would automatically exclude a candidate from appointment. Such exclusion seems to be justified by the need to avoid a conflict of interest, i.e. one who possesses the negative qualities may compromise the whole process. However, one may also question whether the exclusion from appointment relates only to membership in the WPE or security force alone.⁶⁴³ Although these criteria are formally meant to ensure impartiality of the SPO, the institution's impartiality was questioned from the perspective of the moral fitness of its personnel or its actual operation.⁶⁴⁴ The institution was criticised for advancing the vindictive ends of one party to a previous conflict against the vanquished rather than advancing the desirable goals of the nation.⁶⁴⁵ There are other similar perceptions.⁶⁴⁶

⁶⁴² Proclamation No. 22/1992, Above n 634; Article 5

⁶⁴³ The description of violators under the preamble and article 6 of the proclamation refer not only to WPE and security forces but also to armed forces and mass organizations like urban dwellers association and peasant associations. Hence, a former member of the armed forces was not eligible for the post of SPO. However, the issue remains open as to whether a member of mass organization may also be excluded simply because of his or her membership. It would appear difficult to argue in support of the exclusion of all members of mass organization, as this was the practice of the day; and the best one can argue for is the exclusion of leaders of such organizations.

⁶⁴⁴ This was a preliminary objection presented against SPO charges, 13/04/1990 E.C, SPO File No.62/85 (Copy with the author)

⁶⁴⁵ Ibid

⁶⁴⁶ Anonymous R36. Interview with the author on 15 January 2013. The respondent was a lawyer for two accused persons, who refused to be interviewed by this author for fear of what may happen to them if the information gets in to the hand of the current government. This lawyer of the accused persons related to this author that his clients were of the same opinion, and they see the whole process as a drama done against them.

The legal framework also addresses the issue of the applicable laws in the case at hand. In principle, it provides for the ‘applicability of existing laws’ as stated below.

Laws concerning criminal investigation and instituting criminal proceedings as well as laws applicable to ordinary prosecutors shall also apply to the activities undertaken by the Office⁶⁴⁷.

The ordinary criminal laws and criminal procedure laws applicable at the time were those adopted in the 1960th when the codification and modernization of the Ethiopian Laws were undertaken during the imperial regime of Haile-Sillassie. These laws were found mainly in the Penal Code and Criminal Procedure Code of the country. Although the penal code has recently been revised, the investigation and prosecution was intended to be carried out according to the 1957 penal Code and the Criminal Procedure Code, the latter was yet not revised or amended.

The applicability of existing laws implies there was no need for new or special laws to deal with past violations in Ethiopia. One challenge of justice during transitions is arguably the dilemma confronted in the face of insufficiency of existing legal rules on the one hand, and the non-retroactive application of criminal laws on the other. The Ethiopian transitional system of accountability seems to have evaded this dilemma due to the existence of relatively comprehensive and sufficient laws.

However, the proclamation also provides for the non-applicability of some existing laws. Certain time limits provided in the ordinary laws were declared inapplicable.⁶⁴⁸ The other exception to the principle of applicability of existing laws relates to habeas corpus.⁶⁴⁹

⁶⁴⁷ Proclamation No. 22/1992, Above n 634; Sub Article 1 of Article 7

⁶⁴⁸ Proclamation No. 22/1992, Above n 634; sub Article 2 of Article 7. The law states that “Notwithstanding the provisions of sub-Article (1) of this Article, the provisions concerning limitation of criminal action and the time limit concerning the submission of charges, evidence and pleading to charges shall not be applicable to proceedings instituted by the Office.” The first excluded time limit was period of limitation. This non-applicability of the period of limitation was enshrined in the FDRE Constitution, adopted later in 1994. However, the Constitutional exclusion of a period of limitation, under Article 28, was rather restricted to ‘crimes against humanity’. It States “Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation.” In spite of the inability to firmly establish the relation between the SPO proclamation and the FDRE constitution, it is clear to the author that the proclamation excludes the applicability of the period of limitation with respect to offenses committed by the specified persons irrespective of the nature or degree of the offence. The other time-limiting laws excluded from applicability are those laws setting out time limits for the submission of charges, evidence

To sum up, the SPO proclamation generally sets out that the transitional process of criminal accountability will proceed according to existing laws. No new or special laws were required. The investigation and trial were to proceed according to existing substantive and procedural laws. However, it at the same time excluded the applicability of some existing laws, particularly those relating to the period of limitation, time limits for charges, evidence and pleading to charges, and habeas corpus. We might also observe that the proclamation covers other issues.⁶⁵⁰

5.2.2 An Overview of the Ethiopian Transitional Justice Trials

This study aims at assessing the social, legal and political impact of the Ethiopian transitional justice processes by focusing on the framework as well as the end-results. Thus, the assessment of whether the trials were conducted according to accepted norms of international law falls outside the scope of this study. Nevertheless, it would be useful to provide an overview of the trial process, to this I now turn.

As noted in the previous discussions, the SPO was tasked with investigation and prosecution of the crimes committed by members of the Dergue and affiliate institutions. The work of the SPO involves the search for information, collecting and compiling of documents and other evidence, preparing and submitting charges and arguments, and so many other technical tasks. Although the SPO was legally established in 1992, it started its operation in 1993, and

and pleading to charges. Such time limits are normally intended to ensure speedy trial. However, the complexity of the matter at hand might have tempted the exclusion of these laws. We have thus two competing interests - the complexity of the matter requiring more time on the one hand and the need for speedy trial on the other. However, in the absence of any other regulation, the question of the implications of such exclusions on the overall process, and particularly on the need for speedy trial may be raised.

⁶⁴⁹ Proclamation No. 22/1992, Above n 634; sub-Article 3 of Article 7. It provides that “The provisions of habeas corpus under Article 117 of the Civil Procedure Code shall not apply to persons detained prior to the coming into force of this proclamation for a period of six month starting from the effective date of this proclamation in matters under the jurisdiction of the Special Prosecutor as indicated in Article 6 hereof.”

⁶⁵⁰ These other issues include (1) decisions of the Special Public Prosecutors under Article 8, (2) transfer of cases if the case falls outside of SPO jurisdiction under Article 9, (3) delegation of power to ordinary prosecutors in case of need under Article 10, (4) miscellaneous provisions under Article 11, and (5) inconsistencies with other laws, i.e. laws inconsistent with the proclamation are not applicable, provided under Article 1. I have not elaborated on these issues as they are not centrally relevant to the objective of my research. However, I consider them as appropriate when dealing with the specific themes of my analysis below.

as Sara Vaughan noted, various governments assisted the SPO and its works following a July 1993 request by the Ethiopian government for assistance.⁶⁵¹

By the time, the SPO started operating; many suspects had already been in detention for almost two years without charge.⁶⁵² As noted already, the SPO proclamation did suspend habeas corpus provisions for six months and this time was running out. As a result, the SPO “spent the first six months of 1993 responding to more than 1, 200 habeas corpus writs and determining the legitimacy of ongoing detention.”⁶⁵³

Another important work of the SPO in its early stage of operation involved the collection and analysis of evidence, including documents available in the archives of the Derg government.⁶⁵⁴ As, Sara Vaughan observed, the SPO adopted some strategy for accomplishing its task:

The SPO’s strategy for investigation and charging suspects classified the type of crime and the position held by the suspect at the time of the Red Terror into three categories, thereby arranging and ranking the investigations for prosecution accordingly. Group one comprised the policy and decision makers; group two was made up of the field commanders, military and civilian; and group three consisted of the actual alleged perpetrators of many of the crimes.⁶⁵⁵

Nevertheless, the prosecutorial strategy of the SPO was the subject of controversy, as will be seen from people’s perceptions.

⁶⁵¹SARAH VAUGHAN, 2009, The Role of the Special Prosecutor’s Office, In K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 53. Sara noted that three areas of assistance were identified, namely, computerization, infrastructure and technical assistance. SPO donors include: the Canadian International Development Agency (CIDA), the Danish International Development Administration (DANIDA), the government of France, the International Commission of Jurists – Danish Section, the governments of the Netherlands and Norway, the Swedish International Development Agency (Sida), the UN Development Program, the UN Commission on Human Rights, and the US Agency for International Development (USAID). Many organizations also supported the work of the SPO. See SARAH VAUGHAN, at 53 and 54.

⁶⁵²SARAH VAUGHAN, Above n 651 at 52

⁶⁵³SARAH VAUGHAN, Above n 651 at 52

⁶⁵⁴SARAH VAUGHAN, Above n 651 at 55. Sara noted “by mid-1994, 309,778 pages of relevant government documents had been collected, under a process which became an urgent and high-security operation”.

⁶⁵⁵SARAH VAUGHAN, Above 651 at 54

The trial of the first category of ‘high officials’ opened in December 1994, with 46 defendants, and a further 24 individuals including former president Col. Mengistu Hailemariam charged in *absentia*.⁶⁵⁶ This trial was first held in Addis Ababa at First Criminal Bench of the Central High Court and then at the First Criminal Bench of the Federal High Court following a change in the form of the state from unitary to a federal one.⁶⁵⁷

The pre-trial proceedings took a lot of time involving the responses from defence lawyers and court rulings. These involved frequent adjournments, and as a result, the hearing of SPO witnesses in the main trial begun only by mid 1996.⁶⁵⁸ It was noted, “more than five thousand additional defendants were charged in early 1997, over two thousand of them in prison, and nearly three thousand others in *absentia*.”⁶⁵⁹ According to one source, in 1997, the SPO charged 5,198 people, of whom 2,246 were already in detention, while 2,952 were charged in *absentia* (including the Dergue leader, Col. Mengistu Haile-Mariam).⁶⁶⁰

It is important to note that investigations and trials were also conducted in the regions. The following observation could give us a general picture of the regional processes.

About 2, 258 of the defendants were charged in the regional supreme courts by delegation from the federal high court. Thus, 202 defendants were charged in Tigray region, 508 defendants in Amhara region, 421 in Southern People’s region, 198 defendants in Harai region and 174 defendants in Somali region....All the Red Terror cases in the regional supreme courts began in 1998 at the capital city of each region.⁶⁶¹

It would be important to give a highlight of the charges brought against the defendants. As already noted, the SPO proclamation calls for the application of existing laws, and hence all charges were based on national laws of Ethiopia. The defendants were charged individually

⁶⁵⁶SARAH VAUGHAN, Above n 651 at 56

⁶⁵⁷FRODE ELGESEM and GIRMACHEW ALEMU ANEME, 2009, *The Rights of the Accused: A Human Rights Appraisal*, In, K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 37

⁶⁵⁸SARAH VAUGHAN, Above n 651 at 56

⁶⁵⁹SARAH VAUGHAN, Above n 651 at 56

⁶⁶⁰*Human Rights Watch: Ethiopian Dictator Mengistu Hailemariam*. 1991. [online]. [Accessed on 14 Nov.2008]. Available from World Wide Web: <<http://hrw.org/english/docs/1991/29/ethiop5495.htm>

⁶⁶¹FRODE ELGESEM and GIRMACHEW ALEMU ANEME, at 37. It was noted, “data on these regional proceedings are apparently in adequate; and also unidentified numbers of defendants were also brought before the Oromia Supreme Court.”

and collectively for various and complex crimes.⁶⁶² These include public provocation and preparation to commit genocide, Genocide, unlawful detention, and abuse of power. The charge on genocide include murder; bodily harm, serious injury to physical and mental health; placement under conditions calculated to result in death or disappearance; and in the alternative aggravated homicide and grave and wilful injury.⁶⁶³

In the main trials, “the defendants were collectively and independently charged with 209 counts of genocide, aggravated homicide, grave and wilful injury, abuse of power and unlawful detention in violation of the 1957 Ethiopian Penal Code.”⁶⁶⁴

The defendants denied of the commission of the said crimes and presented preliminary and substantive objections to the charges. According to a document issued by the Federal High Court, these arguments in the main trial included that: the court has no jurisdiction and legitimacy to try them; they acted in defence of the revolution, national unity, sovereignty and territorial integrity of the nation; the crime of genocide does not cover political groups, or the killing or elimination of political groups cannot constitute the crime of genocide etc.⁶⁶⁵

The final verdict of the Federal High Court in the main trial was thus rendered almost 13 years after the start of the proceedings.⁶⁶⁶ The following observation provides an overview of the findings of the court in the main trial involving the high officials, or policy and decision makers.

First, the court found all except one defendant guilty of genocide. Second, the court found all but nine defendants guilty of aggravated homicide. Third, the court found all but one defendant guilty of public incitement to commit genocide. Fourth, the court found all but one defendant guilty of unlawful arrest and detention. One defendant,

⁶⁶² FRODE ELGESEM and G.A. ANEME, Above n 661 at 39

⁶⁶³ For details on this, see FRODE ELGESEM and G.A. ANEME, Above n 661 at 39-41

⁶⁶⁴ K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, 2009, Concluding the Main Red Terror Trial: Special Prosecutor v. Colonel Mengistu Hailemariam et al, In K., TRONVOLL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged (African Issues)*, James Currey, at 137

⁶⁶⁵ Special Prosecutor v. Colonel Mengistu Hailemariam et al., First Division Criminal Bench, Verdict, File No. 1/87, 12 December 2006.

⁶⁶⁶ There is no doubt that the examination of the charges as well as the arguments and evidence presented by both parties requires a considerable time. However, as will be discussed there was apparently undue delays having negative effects.

however, was set free by the court as he was found to have defended his case against all charges. The verdict of the court was passed by a majority vote of two to one.⁶⁶⁷

After the verdict, a sentencing process was initiated and both the SPO and the defendants presented their arguments regarding sentencing. After considering the aggravating and extenuating circumstances presented by the parties, in January 2007, the court passed sentencing by a majority of two to one, imposing imprisonment as the main punishment.⁶⁶⁸

The following observation summarizes the courts sentencing.

After rejecting the death penalty, the court imposed rigorous life imprisonment on 48 defendants, 25 years of rigorous imprisonment on two defendants and 23 years of rigorous imprisonment on five defendants. The court ruled that the sentence was not applicable for those defendants who were already sentenced to death in other federal or regional courts for other crimes. The court also ruled that the defendants imprisoned for life may not participate in elections and permanently barred from holding any public office, while the defendants sentenced to 25 and 23 years of rigorous imprisonment are barred from participation in elections and from holding public office for five years from the date of their release.⁶⁶⁹

Thus, in the main trial, “a total of fifty-five top officials of the Derg – WPE government were convicted and sentenced, [of which] twenty-two of the top officials – including Colonel Mengistu Hailemariam, the military leader of the Derg and former Ethiopian head of state 1977-91 – were convicted in absentia.”⁶⁷⁰

The verdict and the sentencing was an issue of controversy. The debate about the sentencing is clear from the following observation.

⁶⁶⁷K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 137 and 138. For an analysis of the dissenting opinion, see pp. 138-140.

⁶⁶⁸See K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Ibid at 141-142. The court rejected death penalty arguing that extenuating circumstances existed and that the aim of punishment is reform rather than revenge.

⁶⁶⁹K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Ibid at 142

⁶⁷⁰K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Ibid at 136

The Ethiopian Federal High Court sentenced Mengistu and his accomplices to life imprisonment. The verdict and sentencing were supposed to close one chapter in Ethiopia's horrendous and turbulent past. By evading capital punishment, however, the court's decision sparked angry reactions since others accused of who were of lower political stature had previously been handed the death penalty.⁶⁷¹

Thus, it was apparent that the prosecution would lodge an appeal. On the side of the defendants too, there was dissatisfaction with the verdict as well as the sentencing.

An appeal was lodged against the verdict and sentencing by both sides to the Federal Supreme Court. The SPO's appeal requests the appellate court to impose the death penalty on the defendants. It forwards three arguments. First, there was no extenuating circumstance as opposed to the High Court's findings. Secondly, the fact that the defendants committed concurrent crimes in their highest official capacity should be considered as an aggravating circumstance. Finally, the SPO argued that the defendants are senior party and government officials that made the decisions and plans for the commission of crimes, it is inappropriate to sentence them to a lesser penalty than low-ranking officials and commanders.⁶⁷²

At the same time, the defendants in the main trial also lodged their appeal against the Federal High Court's verdict and sentencing. The defendants' main arguments included; SPO's evidence did not establish that the defendants committed crimes; and the conviction by the Federal High Court was collective punishment solely based on their membership of the Derg. They also argued that their conviction for the crime of genocide was wrong because the killing or elimination of members of a political group did not constitute the crime of genocide.⁶⁷³

The Federal Supreme Court rendered its decision on both parties' appeals on 26 May 2008.⁶⁷⁴ The Federal Supreme Court rejected the appeal by the defendants against the Federal High

⁶⁷¹K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, 2009, The 'Red Terror' Trials: The Context of Transitional Justice in Ethiopia, In K., TRONVOLL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, at 1

⁶⁷²K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 143

⁶⁷³K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 143-144

⁶⁷⁴Kje K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 144

Court's verdict and sentencing.⁶⁷⁵ It rather accepted the SPO's arguments for the imposition of the death penalty, and thus imposed death penalty on 18 respondents.⁶⁷⁶

The main transitional justice trial presents one example of the many transitional justice trials conducted in Addis Ababa and in the regions capital cities. As noted in Chapter one, a document issued by the Special Prosecutors office, after the end of the trial process, provides a summary of figures about these proceedings including on the number of victims, witnesses and documentary evidence, suspects prosecuted, convicted or otherwise acquitted. Accordingly, of 16, 496 alleged victims, 12, 733 was established in court; 16, 107 witnesses were documented, of which 8047 testified before courts. The SPO submitted 15,214 pieces of documentary evidence; among the suspects, 5119 were prosecuted and tried (some in absentia), of which 3583 were convicted and penalized while 1539 were acquitted.⁶⁷⁷

An important issue that arise in relation to the transitional justice trials in Ethiopia is the rights of the defendants. In this respect, there were serious complaints about the violations of the rights of the defendants. One study reveals that the Ethiopian transitional justice trials involved serious violations of defendants' rights.⁶⁷⁸ These breaches related to the right to be brought promptly before a court and trial within a reasonable time or to release; the right to be tried without undue delay; the right to hearing before an adjudicating court (especially continuous hearing and an uninterrupted presence of all parties including the judges); the right to counsel (especially after the establishment of the public defender's office); and the issue of capital punishment.⁶⁷⁹ Apparently, the trial process involved unreasonable delay impinging on the rights of the accused. Clearly, "the delays can be attributed to both the general handling by the SPO of the Red Terror Trials, the lack of capacity of the Ethiopian judiciary and the inefficiency of the criminal procedure."⁶⁸⁰ The issue of delay had effect not

⁶⁷⁵For more details see K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 144-145

⁶⁷⁶For more details see K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, Above n 664 at 145-149

⁶⁷⁷See SPO Report. (January 2002 E.C). *Dem Yazele Dose* (Amharic word approximately to mean "A file containing blood"). Addis Ababa: SPO. Chart number III. One may note that 16 496 were alleged victims of which 12 733 was established at court.

⁶⁷⁸FRODE ELGESEM and G.A. ANEME, Above n 661at 45-50. We should note that no death penalty was carried out. In fact, many of those sentenced to death get the sentence commuted to life imprisonment and ultimately released following conditional release upon completion of two-third of their sentence.

⁶⁷⁹FRODE ELGESEM and G.A. ANEME, Ibid, at 45-50. We should note that no death penalty was carried out. In fact, many of those sentenced to death get the sentence commuted to life imprisonment and ultimately released following conditional release upon completion of two-third of their sentence.

⁶⁸⁰FRODE ELGESEM and G.A.Ibid, at 44. For more details, see pp.44-47. As will be seen from the empirical data, the dual nature of the SPO mandate is also one reason for the delay.

only on the rights of the accused, but, as will be shown, also affected people's perception on the overall societal impact of the trial process.

To conclude, the above descriptions provide an overview of the Ethiopian transitional trials. It involved enormously huge and complicated processes of investigation, prosecution, trials, verdict and sentencing. It is thus becomes necessary to consider their social and political impact. This involves examination of the appropriateness of the transitional justice framework as well as its ultimate results based on empirical data.

5.2.3 Interrogating the Legal Framework

As discussed in the previous sections, the Ethiopian transitional process of accountability was legally introduced through the establishment of the Special Public Prosecutors Office in 1992 by Proclamation No. 22/1992. It is critical therefore to evaluate whether the legal framework was appropriately designed. The present author has endeavoured to accomplish this task by analysing the data collected through interviews. The responses of each respondent are closely considered, categorized, and connections between different responses were analyzed to identify areas of convergence and divergence in light of specific themes relevant to the legal framework. These themes relate to the following questions.

- Was prosecution the appropriate model to deal with Ethiopia's past? Or differently put, was prosecution an appropriate choice?
- How was the prosecution model designed - was there public participation?
- Was the process all-inclusive in addressing all violations, perpetrators and victims?
- What conception of Justice was adopted, and more importantly was it appropriate?⁶⁸¹

In what follows, I will present the available data, with due care to incorporate the views of the different stakeholders in all themes of analysis.

5.2.1 On the modality adopted

⁶⁸¹ This question is addressed in relation to the other questions, and hence is not given a separate discussion. This is because, this author believes, it cannot be separated from the other issues.

It is clear that the modality of transitional justice adopted in Ethiopia was criminal prosecution against those who committed violations in the past. This research inquired whether prosecution was the appropriate choice in dealing with the past. Respondents were asked the question: *was prosecution an appropriate remedy to past violations*. For purposes of analysis, the responses were categorized into three categories; (1) the pro-prosecution and trial perspective, (2) the pro-truth and reconciliation perspective, and (3) the mixed perspective. Exemplary opinions from each category are presented below.

The Pro-prosecution and trial perspective

According to this view, criminal prosecution and trial was an appropriate response to past violations committed in Ethiopia. Respondents in this category, with some differences in expression and perspective, forward more or less similar arguments in support of prosecution. They also reject other transitional justice processes. Exemplary views are presented and analyzed below.

A former Special Public Prosecutor, after explaining the violations/crimes committed by the Dergue, stated that;

After the coming of a new government (change of government), it was necessary to address the issues of justice in the country just like other issues because justice had been denied for a long time and the need for justice was upfront and cannot be overlooked. Justice was really a priority area. Therefore, the fact that the transitional government had recognized the absence of justice during the Dergue regime and that the perpetrators had not been brought to courts, and its conviction to address the issue of justice, perhaps giving more priority to it, by establishing appropriate institutions is a very justified measure. It was a matter of urgency to address such a long overdue issue. So, it was appropriate to investigate these matters and bring perpetrators to justice.⁶⁸²

⁶⁸² Anonymous R3.2012. Interview with the author on 12 December 2012. Addis Ababa. [Cassette recording in possession of author]. This former SPO nevertheless commented that the lack of adequate reparation can be considered as one weakness of the framework.

These arguments are consistent with the theoretical justification forwarded by proponents of prosecution as discussed in chapter 4. Prosecution was justified in light of the violent past and the denial of justice; as a repressive regime, the Dergue committed crimes with impunity, and hence the new system has to put an end to impunity and uphold rule of law.⁶⁸³ Considering the extensive violations discussed in chapter two and the absence of accountability, justice may be a critical issue that requires to be addressed after a change of government. However, the above opinion emphasises on the need for retributive justice. However, this notion of justice is criticised, particularly by the second category of respondents. Although the above view commends the government for what it did, this same appraisal suggests the extent to which the incoming government has influenced the framing of the process. It also suggests the real motivations in formulating transitional justice processes discussed in chapter four. The government, arguably, was motivated by the desire to see justice; it was not driven by emotion or self-interest.⁶⁸⁴

Another former SPO, beginning with a critique of bad experiences of transition in Ethiopia, argued in favour of prosecution and trial in the following manner:

We had a bad experience of transition in this country⁶⁸⁵....When we see the transition of the 1991 and what followed, we can see two departures. First,... the government had honoured its promise of bringing Derg officials to justice. Second, they were tried in an independent and impartial manner. When we consider these two things and the current release of the convicts unlike what they themselves did to the officials of the imperial regime, we can witness a better experience not only to Ethiopia but to Africa as a whole. It is a departure from the past and a new experience; it was a country where the incoming government used to exterminate former officials; now we have a better experience.⁶⁸⁶

⁶⁸³ This respondent also admitted that other political groups committed crimes, which will be discussed under inclusiveness of the framework.

⁶⁸⁴ However, as will be shown, this position was contested by respondents in the second category.

⁶⁸⁵ This bad experience relates to the history of Ethiopian leaders violently dealing with former leaders. A recent history of this is shown in chapter two, where the Dergue extra judicially killed the last Emperor Haile Sillassie and sixty high officials of the Imperial regime. History also shows how the various emperors or kings dealt with previous emperors at their wish.

⁶⁸⁶ Anonymous R6 . Interview with the author, December 2012. Addis Ababa. This former SPO, even argued, other options are inconsistent with the legal solution. This argument is not convincing in light of the discussion made under chapter 4, particularly in light of the idea of holistic approach to transitional justice.

Here, the case for prosecution rests on two things. First, what the incoming government did during the transition is a departure from previous bad experiences where the fate of former leaders was placed in the hands of new leaders. From chapter two, we understand how the Dergue extra judicially eliminated Emperor HaileSillassie and his high officials. This is an experience of political justice, where the leaders do whatever they want against those believed to be criminals or perpetrators. Although such comparisons are important, one may question whether issues of transitional justice are issues of governments or leaders alone.⁶⁸⁷ Secondly, the view asserts the impartiality and independence of the prosecution and trial process. This implies that the elements of legal justice were satisfied. This again might suggest a departure from previous experiences of political justice.

The argument in support of prosecution also depends on its role in preventing revenge or private justice.⁶⁸⁸ This view reaffirms the appropriateness of criminal prosecution underlining that it had prevented possible revenge for past violence. It implies the relation between the lack of accountability and revenge, in the sense that individual justice would have been pursued in the absence of prosecution. However, two questions arise. First, could not other processes of accountability prevent revenge? Secondly, and more importantly, such an argument assumes prosecution of all perpetrators, which does not fall under the scope of prosecutions within the framework or the practice of the actual prosecution processes. Nevertheless, it is useful to note that the above opinion goes hand in hand with the prosecution arguments discussed in chapter 4, which present ‘harmful effects’ of non-prosecution as a justification for prosecution.

A Special Advisor to the Prime Minister forwarded a similar argument by explaining the appropriateness of prosecution and inappropriateness of truth and reconciliation in light of the nature of transition in Ethiopia.

It is important to ask when truth and reconciliation works. Truth and reconciliation works when two groups confrontationally face each other and you want to avoid further casualties. There are times when truth and reconciliation

⁶⁸⁷This issue is addressed in the sub-section dealing with the manner of designing the framework.

⁶⁸⁸Anonymous R6, Above n 686. This former SPO noted, “The Ethiopian transitional justice model of dealing with the past through judicial process was very appropriate. It had prevented revenge. If the matter was handled through truth and reconciliation, it could have led to revenge even if the perpetrators publicly admit or acknowledge their crime.”

works. It is not any time. We have passed that time; the Dergue regime was over. So when the issue of how to handle the case arose, it was decided that it should be according to the law; we never take anything outside of the law. Dergue was operating outside of the law; it dismantled the parliament; it dismantled the law; it killed people without the law; the Dergue was a system without law. Thus, it was necessary to handle the case according to the law in order to establish rule of law. That is the reason we choose the legal way of handling the matter.⁶⁸⁹

This suggests the general point that mechanisms of dealing with the past are context dependent, and in the Ethiopian context, prosecution, rather than truth and reconciliation was the appropriate solution. The view is that truth and reconciliation applies in case of negotiated transition. The Ethiopian transition resulted from the victory by the incoming government and the defeat of the Dergue, and hence there was no room for negotiation. Hence, in deciding how to deal with the past, it is clear that the incoming government decided it should be according to the law. In light of the fact that the Dergue dismantled the legal system and installed a system without law, one may appreciate the significance of prosecution to establish a new system founded on the rule of law. It sends a message that the new system is a departure from the past. This opinion supports the pro-prosecution arguments discussed in chapter four. However, the question is whether the rule of law is the only objective of transitional justice processes. Moreover, some of the expressions used by this senior government official – “we never take anything outside the law”, “that is why we choose the legal way of handling the matter” - show not only that the decision to prosecute was made by the government but also the unwillingness to adopt other alternatives that may promote other objectives.

In his opinion, the special advisor was also mindful of the importance of reconciliation but rather preferred the legal process as a solution.

We do not know how much reconciliation has succeeded in South Africa.... I am accepting the argument that reconciliation prevents the creation of further conflicts within society. However, there is nothing like the rule of law. The law is the foundation of a society that has no alternative. There was a time when,

⁶⁸⁹ Anonymous R4. Interview with the author on 14 December 2012. Addis Ababa

regarding the conflict in Somalia among the different clans, I was thinking of bringing the different clans together through truth and reconciliation; but not all efforts you make outside of the law may succeed.⁶⁹⁰

This view recognizes the importance of reconciliation to peace and stability, an affirmation of the discussions made earlier. Nevertheless, here, we should note three interrelated points. First, although reconciliation was thought to be a good solution to Somalia, it was discredited as a solution in the Ethiopian context; however, if reconciliation prevents future conflicts, would not this be true for Ethiopia? Secondly, although the importance of reconciliation is admitted, the view is that no efforts including reconciliation outside the law may succeed. This highlights the problematic relationship between prosecution and reconciliation, as discussed in Chapter 4. However, reconciliation may not necessarily negate the rule of law. As discussed earlier, justice and reconciliation should not be seen as a trade-off. In other words, a society may adopt a transitional justice process that would advance reconciliation without forgoing justice or the rule of law. One may think of complementary mechanisms of promoting justice, rule of law, truth, and reconciliation. Finally, the above respondent is suspicious of the success of reconciliation in South Africa. Although drawing experiences and questioning the South African process of reconciliation is appropriate, it is difficult to dismiss reconciliation entirely for the same reason the respondent raised earlier, i.e. all processes are context dependent. The argument that it did not succeed in South Africa does not warrant failure anywhere.

Another respondent, a brother of a victim of red terror, opined that the legal way of handling the matter was appropriate.⁶⁹¹ He pointed out that “it was difficult or not good for the government to pursue other options; the government had no other option except to detain and prosecute the perpetrators.”⁶⁹² It is interesting to note that although he did not himself believe in retribution or revenge, he thought the legal process was generally the appropriate solution.

⁶⁹⁰ Anonymous R4, Above n 689. The argument goes on saying “Apartheid had a philosophical ground; It was preached even by citing reference from the Bible; I do not know whether reconciliation had succeeded.”

⁶⁹¹ Anonymous R38. Interview with the author on 13 November 2012. Mekelle. [Cassette recording in possession of author]. This family of a victim commented “prosecution and trial should be meant to educate the public and not to serve as revenge. He stated that he did not follow the proceedings in Mekelle, where his brother was killed, because he did not believe in revenge, which implies that the purpose of prosecution was revenge. Though this may negate prosecution as his preferred choice, he nonetheless supports prosecution as a general solution to past violation. He also commented “what do I get from it; My brother was killed. Do I get any thing from the prosecution?”

⁶⁹² Anonymous R38, *ibid*

Asked whether a truth and reconciliation process was possible or desirable, he replied as follows:

Reconciliation was impossible because people were angry at the time. Things settled down because of the detention of the perpetrators. If reconciliation efforts were undertaken, it would give the impression that the new regime was not better than or even the supporter of the former leaders. It was not acceptable. If you say let us bring the matter to negotiation, no one negotiates with his brother's killers.⁶⁹³

This is a victim /relative's view of the Ethiopian framework. It generally views prosecution as a proper modality of dealing with past violators while truth and reconciliation or other processes were rejected based on two grounds. The first is the implication for the new government in the sense that pursuing prosecution was a matter of legitimacy. As opposed to the first respondent, the opinion here suggest one motivation in the Ethiopian transition was the incoming government's self-interest to present itself as different from the out going government. The second emphasises that victims were not ready to accept reconciliation or other processes, and thus highlights reconciliation cannot be imposed. This victim's family supports at least some aspects of the process (the detention of the perpetrators) for its instrumentality in avoiding vengeance (revenge) or legitimacy of the new regime.⁶⁹⁴ He further noted:

It would have been better if...some compensation have been paid. However, the Dergue members did not have money to pay compensation. I would have liked if the new government could have paid some compensation.⁶⁹⁵

This highlights the importance of payment of compensation to victims or relatives. Some respondents in this category and third category share this idea.⁶⁹⁶ However, a senior government official and a former Supreme Court judge do not accept the idea of

⁶⁹³ Anonymous R38, *ibid*

⁶⁹⁴ Anonymous R38, *Ibid*. He noted, "the detention of the top leaders at the time was appropriate because in the absence of such, people would have killed each other, and it was not good for the regime for it could have gave the impression that the new regime was just like the Derg regime."

⁶⁹⁵ Anonymous R38, *ibid*. Although of little relevance, I should indicate that this respondent also acknowledges the importance of acknowledgement of crime by perpetrators once the legal process was over.

⁶⁹⁶ Anonymous R6, Above n 686; Interview with Anonymous R20

compensation.⁶⁹⁷ While noting the existence of legal framework to claim compensation from individual perpetrators, direct claim from the government was apparently problematic, as suggested below:

Such kind of compensation framework was not in place at all. The question whether the transitional government should accept the crimes of the old regime entails considering resource capabilities and above all compromising principles. Primarily, the new government had to make an armed struggle protesting existing human rights violations, took arms to fight, and in most cases being victim itself of the gross rights violations. In all these and other reasons, therefore, the possibility of such compensation framework remains questioned.⁶⁹⁸

We shall consider two arguments that question the issue of reparation or compensation. The first is the question of resource limitations, which makes compensation difficult. However, as argued under chapter 4, “the level of difficulty is not a legitimate excuse of governments to avoid their legal and moral obligation to provide redress to victims.”⁶⁹⁹ Thus, difficulty should not be taken as impossibility. Secondly, the above view argues that the new regime in Ethiopia cannot be held responsible for violations committed by the former regime. The discussion under chapter 4, again, contests such assertion because successor regimes have an obligation to provide remedy for violations committed by previous regimes. This is important not only to redress wrongs but also to move forward. Thus, the arguments against compensation or reparation are apparently not acceptable.

Although the significance of reparation or compensation was acknowledged, the arguments against a reparation or compensation policy were also based on the difficulty of setting the time of departure for compensable wrongs and whether compensation is the primary component of the Ethiopian conception of justice.⁷⁰⁰ It is true that violence and violations of

⁶⁹⁷ Anonymous R4, Above n 689; and Anonymous R2. Interview with the author on 13 December 2012. Addis Ababa.[cassette recording in possession of author].

⁶⁹⁸ Anonymous R2, Above n 697.

⁶⁹⁹ DOXTADER, Above n 531 at 27

⁷⁰⁰ Anonymous R2, Above n 697. He further noted “To say that justice is really served, we need to acknowledge the fact that civil reparation and civil remedy are indispensable, which in our context is doubtful to say the least. The country of ours holds a long history of oppression, repression and crimes against humanity. It is not only victims of the red terror who have scary memories of our past. It goes further back to periods of the kings and old empires, where countless crimes of many forms had been committed....That is why addressing the issue [of reparation] becomes a more complex one. In fact such things would have been easy to address in an

rights have a long history in Ethiopia. However, if the significance of reparation is acknowledged, the problem of determining which wrongs are compensable is a question that relates to the difficulty of reparation programs and this difficulty, it can be argued, cannot be an excuse to neglect a legal and moral obligation. The point that reparation works in individualistic western societies and smooth transitions is difficult to defend in light of the discussion under chapter 3 and 4. Reparation has significance to post-conflict and post-authoritarian societies whether the transitions occur through negotiation or force. The question whether compensation is a primary component of justice in Ethiopia might have important point. However, the counter argument that it is a component of justice is not denied and that is why the victims above preferred the incorporation of some reparation program not as a substitute but as a complimentary remedy. We should recall, as discussed under chapter 4, that reparation is the most direct benefit to victims of past crimes. Reparation should neither be seen nor implemented as blood money. It is a form of acknowledgment of past wrongs and an expression of the commitment not to repeat the past. A former SPO prosecutor, who supports the prosecution process nonetheless criticised the Ethiopian transitional framework as “obviously defective” for its failure to address questions of reparation.⁷⁰¹ This is a problem of incomprehensiveness in addressing issues of transitional justice.

Nevertheless, one should note that the incoming government instituted mechanisms of restitution as an important component of reparatory justice or transitional justice in general, however limited the implementation might be.⁷⁰² Separate laws were adopted later in 1995 and 1996 allowing victims to reclaim properties they were arbitrarily deprived of.⁷⁰³ As discussed in chapter 4, the reclaiming of property rights or restitution is a key component of reparation for victims, and hence can be taken as an important element of the Ethiopian

individualistic society and in cases where basically smooth power transition is possible.” He further noted that “the concept of justice in the country is fundamental....What kind of concept of justice is held by the general public. Ours is quite a different case. In our case victims are often much worried about bringing perpetrators to justice than receiving a compensation. The issue of compensation is commonly relegated to a secondary agenda.”

⁷⁰¹ Anonymous R3, Above n 682.

⁷⁰² K. TRONVOLL, C. SCHAEFER, AND G.A. ANEME, 2009, The ‘Red Terror’ Trials: The Context of Transitional Justice in Ethiopia, In K., TRONVOL, C. SCHAEFER and G.A. ANEME, (eds.). *The Ethiopian Red Terror Trials: Transitional Justice Challenged(African Issues)*, James Currey, p. 9

⁷⁰³ See Proclamation No.110/95; the Proclamation for the Review of Properties Taken In violation of the Relevant Proclamations; Directive No. 001/96, A directive establishing the procedure of restitution of properties as per proclamation 110/95.

transitional justice process. Nevertheless, they are restricted to violation of property rights alone and a comprehensive reparatory program is lacking.

An elderly woman who lost her husband and son due to Dergue's Red Terror noted the appropriateness of the process as follows:

The Dergue massacred the people, and the prosecutions focus on Dergue members that massacred the people was an appropriate procedure. However, even those that supported the Dergue should have been prosecuted.⁷⁰⁴

Clearly, this suggests that actors other than perpetrators should have also been held accountable. However, looking at the challenges of prosecution, one could question if this is possible or even desirable. Nevertheless, holding them accountable through other processes might be possible. It is important to note that the above victims' family also notes the significance of some reconciliation process although it was thought that this should come at the end of the judicial process; as noted below:

Reconciliation has been one of the essential values in the culture of our people. We lived this way for long. However, reconciliation was not possible while the judicial process was underway because the perpetrators were not acknowledging their wrongdoings. Once the judicial process was over and the perpetrators were convicted and acknowledge their wrongdoing, I think it is proper to reconcile. I think this was done through elders.⁷⁰⁵

While this view clearly highlights the importance of reconciliation, there is no evidence whether such reconciliation did take place. This is confirmed neither by other victims nor by officials. Nevertheless, it demonstrates the significance of reconciliation from the perspective of a victim's family

Similarly, some residents in both Mekelle and Addis Ababa support the view that the prosecution and the judicial process was the appropriate mechanism of dealing with the

⁷⁰⁴ Anonymous R8. Interview with the author on 15 October 2013. Addis Ababa. [cassette recording in possession of author]

⁷⁰⁵ Anonymous R8, Ibid.

past.⁷⁰⁶ Moreover, three of the four judges/former judges and a former Dergue Cadre⁷⁰⁷ interviewed have aired more or less similar opinions. However, apart from stating prosecution was appropriate, most of them gave little or no explanation. I think it could be sufficient to present the view of a former Supreme Court vice president:

The protection of human rights is a matter that has gained international recognition. Thus, it is not an issue of our country alone; human rights are matters that all countries consider as their own agenda. It is not only protecting human rights, each state has an obligation to address human rights violations if they are committed. I think, our country has followed a similar route.⁷⁰⁸

The interesting point here is the appeal to international human rights law grounding the support for prosecution. This arguably relates to the duty to prosecute imposed by international law, as discussed in chapter four. Thus, prosecution was seen not only as a matter of choice but also as a matter of discharging the duty of the state under international human rights law.

Some have underlined the inappropriateness of truth and reconciliation on the ground that the context in Ethiopia did not support it.⁷⁰⁹ It was contended the context in South Africa was different from the one in Ethiopia in terms of their history, manner of transition, nature of party in power, and availability of evidence.⁷¹⁰ Thus, the appropriateness of prosecution, and the inappropriateness of truth and reconciliation, to the Ethiopian context was reiterated.⁷¹¹ The ordinary, judicial and ordinary way of dealing with violations was seen as the appropriate mechanism of dealing with the past. Apart from the victorious-vanquished debate, the availability of evidence was also presented as a reason, with the implication that

⁷⁰⁶ Few examples here include Anonymous R13, R17, R18, R32 and R 33.

⁷⁰⁷ Anonymous R9. Interview with the author on 9 November 2012. Addis Ababa. This respondent was a Dergue Cadre in Mekelle during the red terror. He was nevertheless not prosecuted because, according to him, he was not involved in violations, and even related to the author that he was not informed of any of the red terror mass killing plans or their execution, and that he became aware of the crimes committed as any member of the society.

⁷⁰⁸ Anonymous R2, Above n 697

⁷⁰⁹ Anonymous R2, *ibid*. He commented, “in thinking about a solution, the context is essential; I do not think, a copy and paste of a solution of one country works for another”

⁷¹⁰ Anonymous R2, *ibid*

⁷¹¹ Anonymous R2, *ibid*. This was noted as “When I think in retrospect, rather than the truth and reconciliation, following the judicial, ordinary and well known path does not seem problematic to me. Was it possible to adopt truth and reconciliation in our context at the time? I doubt that. It is necessary to look at the political conditions at the time. On the one hand, we have the victorious force, and on the other we have the vanquished...There was evidence, and other things were available. Thus, pursuing the official, judicial path was appropriate.”

truth and reconciliation may be pursued when there is a problem of evidence. It is clear that the above views are compatible with the official narration as noted by the Special advisor to the PM.

Generally, the above views underline that prosecution was an appropriate mechanism of dealing with the past. Despite their different personal backgrounds, all of them endorse prosecution as an appropriate mechanism of dealing with past violations. Nevertheless, points of divergence among these respondents on the implication and outcome of the process remain. However, the adequacy of prosecution might be questionable. Let us turn to the pro-Truth and Reconciliation arguments.

The pro-Truth and Reconciliation process perspective

This perspective rejects the prosecution and trial process, in favour of others particularly the truth and reconciliation process to deal with past crimes. Once again, more representative responses are presented below with due care not to ignore possible variations within this category.

A lawyer with an international prosecution processes rejected the Ethiopian prosecution and judicial process for its actual failure to address the past:

The trials were isolated. They were held in very isolated quarters, the attendants of the trial were very few people; actually, towards the end, there was no audience at all. So, it was badly organized. The attempt was really more of revenge than bringing about reconciliation. So, the purpose was just to punish those wrong doers rather than teaching the people of what had happened, and exorcise the demon of the red terror. The Concentration or the emphasis was on more of revenge than reconciliation.⁷¹²

Here, the prosecution process is criticized for its emphasis on punishment or revenge rather than reconciliation and the education of the people. The above opinion is in line with the idea presented by opponents of prosecution including Kader Asmal [discussed in chapter four].

⁷¹²Anonymous R11. Interview with the author on 16 December 2012. Addis Ababa. [cassette recording in possession of author]

This view considers reconciliation and public education as important elements of transitional justice processes. As already discussed in chapter 4, retributive justice might, coupled with other processes, even contribute to reconciliation. The problem arises when retribution is seen as the sole purpose of criminal proceedings. As discussed in chapter 4, the perception of prosecutions as vengeance may affect the outcome of the transitional process. Another criticism that was made of the actual process was the lack of proper organization of the trials and the absence of public attendance of the trials. Interestingly, respondents from the first and third category also recognized these deficiencies.⁷¹³ In the absence of proper organization and public attendance, a question arises whether the process would educate the public about the past and its effect on future behaviour. This also questions whether victims' needs - for example the need for justice and truth – could possibly be satisfied. Moreover, the process is criticized for the lack of rehabilitation – perpetrators and even victims. The implication of this view is that the prosecution process did not result in effective transition.

This point is reiterated as follows:

The attempt or concentration was really more on punishment than reconciliation or even rehabilitation of the wrongdoers. I do not believe that the devil of the red terror has been exorcised really. I do not think the trials have really cleansed the people from the red terror guilt. ...It has not contributed anything whatsoever to the reconciliation of the people.⁷¹⁴

This is a strong indictment of the prosecution process as it was operated and implemented in reality. The above view also reveals certain preferences including reconciliation, educating the people and rehabilitation. The significance of reconciliation is highlighted by citing the consequences of the lack of it:

⁷¹³ Anonymous R10. Interview with the author on 16 December 2012. Addis Ababa. [Cassette recording in possession of author]. Anonymous R31. Interview with the author on 17 December 2012. Addis Ababa. R31 “the lack of prosecutorial strategy on the part of the SPO creating problems even for victims to attend proceedings.” R10 indicated, “the public lost interest in the proceedings as time goes by, ultimately making the trial a forum only for the judges, the SPO and the defendants.” He stated even victims or relatives lost interest in the proceedings.

⁷¹⁴ Anonymous R11, Above n 712

The ethnic hatred that is developing within the country is frightening; especially for a person who has witnessed what happened in Rwanda. It really terrorizes me what is happening. That is the consequence of [the lack of] any reconciliation.⁷¹⁵

This view is wary of the negative effects of lack of reconciliation in Ethiopia – ethnic hatred. This opinion is shared by a former SPO, who commented, “the Government far from promoting reconciliation is escalating division and polarization within the society”.⁷¹⁶ In other words, reconciliation would have prevented such hatred, which may lead to future conflicts. This is noted as follows:

...the opposition parties time and again ask [for there to be] reconciliation between *the different factions*, and of course there were several people killed during the EPRDF reign. There were many requests for all round reconciliation within the country with the victims of the red terror, between *perpetrators of these crimes and victims if they are alive or their relatives*; and conflict has been going on for a long time in Ethiopia now. So, it is a society which is living in conflict to this day because of lack of reconciliation, because no effort has been made on reconciliation.⁷¹⁷

This view highlights the importance of reconciliation in the Ethiopian context – reconciliation both at individual and political or social level. Second, the lack of reconciliation has led to the continuation of conflicts in the society. This suggests that the transitional process – prosecution - has not stopped conflicts within the society. Thirdly, as discussed in chapter 4, prosecution is considered as having a strong deterrence effect. The above view suggests, in the Ethiopian context, prosecution has not served as deterrence because the incoming government continued to commit similar violations.⁷¹⁸ We should also note the view that the opposition’s call for reconciliation, or all round reconciliation was ignored by the government, which might suggest the government’s motive was punishing perpetrators or as implied earlier to perpetuate division among the society.

⁷¹⁵ Anonymous R11, Above n 712

⁷¹⁶ Anonymous R3, Above n 682. This respondent thinks that some reconciliation processes would be undertaken after the legal process was completed.

⁷¹⁷ Anonymous R11, Above n 712

⁷¹⁸ However, the violations were of lesser degree. Some respondents in the first and third category believe that similar violations have continued to be committed. These respondents include Anonymous R3, R10 and R 20.

Proponents of the prosecution process dismissed political reconciliation as an impossible aspiration, clearly noted in the following questioning:

Who are the parties to a dispute/who is in animosity with whom? Who is to reconcile?
If one group says I can violate people's right, and the other (the governing party) says
I will not allow violation of peoples' right, how can reconciliation be possible?⁷¹⁹

This is a rejection of political reconciliation on the assumption that opposition parties want to continue the culture of violence and the government is defending rights, and hence there is no room for reconciliation.⁷²⁰ However, the possibility of individual level or community level reconciliation is accepted in the following terms:

If we talk of apology and forgiveness, rather than among political groups, apology and forgiveness shall be directed to the people; and reconciliation shall be seen from that perspective.⁷²¹

This clearly suggests the possibility of individual reconciliation without political reconciliation. As discussed in chapter 4, whether individual reconciliation takes place without political reconciliation or vice versa is contestable. However, it is interesting to see other proponents of prosecution that criticize the government's rejection of the need for reconciliation. Thus, a former SPO prosecutor stated:

I understand reconciliation in a different way than the government's version of simplifying and trivializing the concept. The Dergue regime had created a big polarization within the society, within nations and nationalities. This has escalated even after this government.... The society has been absolutely polarized. Hence, one would want to take complementary measures to rectify this polarization and establish some sort of consensus.⁷²²

⁷¹⁹ Anonymous R5. Interview with the author on 18 December 2012. Addis Ababa

⁷²⁰ Nevertheless, this perception about the opposition in itself shows the continuation of deep-rooted hatred and mistrust among the main political players.

⁷²¹ Anonymous R5, Ibid.

⁷²² Anonymous R3, Above n 682

The interesting point here is although the respondent supports prosecution, he also believes in the need for and possibility of reconciliation. The existence of polarization within society makes reconciliation necessary. However, reconciliation is seen not as a substitute for prosecution, but as a complementary measure.⁷²³ It emphasises the point that reconciliation requires some form of justice, as discussed in chapter 4. A victim who primarily supports prosecution supports this idea of reconciliation at the end of the judicial process.⁷²⁴ This is a reflection of the idea of holistic approach to transitional justice.

A victim of the red terror and former Minister rejected the prosecution process as inappropriate solution:

In Ethiopia, the Derg killed a generation. As I said, very few people received judgement. The majority were not even questioned. Do we not have a murderer Derg member who was not detained even for a day? ... Those whose hands were involved in these crimes from the top to the bottom were not touched at all; may be 0.1% of them might have appeared before courts, for different reasons. You cannot try a system by imprisoning ...few people. In the first place, it is not justice to imprison 20 persons especially in the absence of their leader [a reference to Col. Mengistu Haile-Mariam]. For a generation lost, detaining, punishing, hanging and killing just 20 people was not a solution. One generation was lost, close to a million; I do not think punishing 20 people for the lose of a million of a generation is the solution.⁷²⁵

Here, the rejection of the prosecution process was based on its limitation in prosecuting very few violators; the majority of perpetrators (99.9%) were not brought to justice. However, some respondents from the first category contest this arguing to the contrary that the SPO prosecuted too many people.⁷²⁶ A respondent from the third category has also opined, “looking at the numbers prosecuted, one would not say it is too few: but compared to the

⁷²³ Anonymous R3, Above n 682. R3 commented that such processes were expected at the end of the prosecution process.

⁷²⁴ Anonymous R8, Above n 704. Unlike the SPO, however, she stated such reconciliation did take place through elders.

⁷²⁵ Anonymous R39. Interview with the author on 12 December 2012. Addis Ababa. [Cassette recording in possession of author] . One should note that the maximum sentence was death penalty but never implemented; so there was no hanging and killing of convicts.

⁷²⁶ Anonymous R31, A, Above n 713; Anonymous R2, Above n 697. Both argue the absence of selectiveness had led to delays.

number of prosecution, one may say few were convicted.”⁷²⁷ Nevertheless, it is important to note how a victim’s perception is different. An effective transition may require some level of satisfying victim’s needs. The dissatisfaction of the victim with the prosecution process raises a question about whether effective transition is possible at all. Again, the points above about the number of prosecutions and convictions may demonstrate the problematic aspect of wholesale prosecution – whether it is possible and desirable – discussed under chapter 4.

Arguably, another problem with the prosecution process was that “...the Dergue destroyed evidence relating to red terror ... before 1983 E.C[before its fall].”⁷²⁸ The implication is that the destruction of documentary evidence by the Dergue had constrained the prosecution process. However, a former Supreme Court judge has refuted this argument.⁷²⁹ Hence, the argument is that there was sufficient evidence to show that the state and Dergue members committed crimes, which reaffirms prosecution was a proper process of addressing the past. However, there existed certain limitations regarding evidence although not clearly attributed to deliberate destruction of evidence by Dergue members. There might be sufficient evidence regarding the crimes committed by the top leaders (or big fish). However, in light of the enormity of violations, the above view may impliedly tell us that some violators, if not many, went free.

Rejecting the prosecution process, the respondent commented:

...the establishment of the SPO was from the beginning unfair; the office should not have been established; because it was not the appropriate solution. Can you solve

⁷²⁷ Anonymous R10, Above n 713.

⁷²⁸ Anonymous R39, Above n 725. According to this respondent, these destructions of evidence occurred following the attempted coup in 1983 E.C

⁷²⁹ Anonymous R2, Above n 697. He noted “I do not know how much of the documentary evidence was destroyed, and how much is left. A lot of evidence exists. If this is what is left, we can imagine what the whole evidence would be. A document recently published by the SPO includes lots of evidence collected from the Palace. If the Dergue members did not destroy this evidence, I do not understand which evidence they destroyed. Any way, if they have destroyed, they have not destroyed it all because the magnitude of the crime was so big that it was not possible to destroy all.... In any case, I would not think there was problem of evidence; rather, there was overwhelming evidence. These people or the regime was even declaring their acts of killings in newspapers and through radio and television...So, I do not think there was a lack of evidence because the government, that had a policy of committing crimes, could not possibly destroy all evidence. It may be difficult to find evidence in respect of each crime committed in every kebele [Amharic word for the lowest administrative level – locality]. I would not say there was lack of evidence to show that the big fish committed genocide or other serious crimes.”

Ethiopian political problem by establishing a certain institution that works for a limited time? You cannot solve.⁷³⁰

The central point here is that Ethiopia's problem is a political problem, which can hardly be solved through prosecution. This would normally lead to other alternative (s), which the above respondent would have preferred:

The red terror issue is an issue that concerns Ethiopia as a nation. It is a national issue. It cannot be solved by putting few officials in prison. The problem is social. Social solution should be sought. Red terror is a tiny manifestation of Ethiopian politics. The bigger manifestation is how did the political forces called Dergue came to power? Who authorized it? Who opposed it? Who supported it? These are the problems.... Why did Ethiopian people keep silent while this was happening? What was the international community doing? There was silence. Thus, for this social and international problem, the solution cannot be to imprison few Dergue officials especially in the absence of their leader. As the problem was a social one, the solution should be a social one.⁷³¹

Clearly, the main problem identified here is how a repressive regime came about. Accordingly, the Ethiopian people and the international community were also responsible for letting the Dergue exercise state power. The people might be accused for supporting the regime or being silent. Hence, prosecuting some officials of the Dergue cannot be a solution according to this view, especially in the absence of Mengistu Haile-Mariam. Hence:

The solution is to prevent the coming to power of any dictatorial regime (government).... The problem was how the Dergue did come to power. Who permitted it? The solution is to close that road; closing the possibility for coming to power using weapons or force. It is eliminating dictatorship; it is building a system; the lack of a system had created problems; if the case was one of few killings, it is a killing outside of the court, and it could have been dealt with accordingly; now, the problem is one of dictatorship regime or system, thus this road needs to be closed.⁷³²

⁷³⁰ Anonymous R39, Above n 725

⁷³¹ Anonymous R39, Ibid

⁷³² Anonymous R39, Ibid

This underlines the systemic and political nature of the problem, and the need for other transitional processes. It argues a social problem cannot be solved through trial. Improving political culture, creating the culture of dialogue, listening to each other, understanding and accommodating political differences, getting rid of the thinking that I shall alone rule, and creating a new system are thought as proper solutions not to repeat the past.⁷³³ It is further stresses that ‘unless we do these...the past will come again.’⁷³⁴ One crucial point abovementioned is the responsibility of the people – for, at least, keeping silent when the military took state power. According to Elster’s agents of transitional justice, they might be characterized at least as bystanders. In this respect, a senior government official opined that:

There is a saying that each people gets the kind of government it deserves. I am not sure whether this applies to Ethiopia. The people might have contributed in terms of supporting the Dergue because of excitement about the proclamation of land for the tiller; but Ethiopian people did not bring Dergue to power. One could not blame the people for supporting the military because it brought feudalism down; the motto was even ‘Ethiopia first without bloodshed’. Before the Dergue begun to kill, it looks like what is called the Prague Spring; for almost two months people were free to write what they want; there were festivities around Arat Killo. The real Dergue emerged later; It was later that people came to know that the Dergue was such a demon.⁷³⁵

As opposed to the previous view, the argument here is that the people cannot be responsible for what happened in the past. The problem lies with the Dergue, and hence, the establishment of rule of law is necessary to avoid the recurrence of similar events.⁷³⁶ Thus, the respondent further emphasises the significance of ensuring the rule of law, through prosecution process, that could prevent the military or dictators from coming to power.⁷³⁷

⁷³³ Anonymous R39, Above n 725

⁷³⁴ Anonymous R39, ibid.

⁷³⁵ Anonymous R4, Above n 689. A document published by the SPO in 2002 provides that although the Ethiopian people welcomed the overthrow of the imperial regime, they never supported the military’s taking control of state power. See “Dem Yazel Dose”, published by SPO, January 2002 E.C, Far-East Trading, Pvt.Ltd, Addis Ababa

⁷³⁶ Anonymous R4, Ibid

⁷³⁷ Anonymous R4, ibid. He stated “A coup does not happen in England and the US because there is a rule of law even if that rule of law may have many problems within it. You do not expect the military to take over

However, other respondents, in addition to arguing in favour of improved political culture and dialogue, further emphasised that a truth and reconciliation process was preferable as a solution to prosecution.

The solution was to adopt a path similar to the one in South Africa. They said let us forgive each other.... Thus, in our case, without saying this and that, let every one tell what he did. Just to be in the opposition cannot show innocence. Everyone's hand was involved in the killings perhaps with difference in degree. So, let everyone come forward and tell what he did; and let it be registered clearly. Let one begin to do so; let us all begin to do so; including me if there is something I did. [a truth and reconciliation process] serve as a forum where by every one of us promise to each other that the past will not be repeated again.⁷³⁸

Interestingly, although this respondent is a victim of red terror, he underlines the importance of truth-telling and recording, forgiveness and all round commitment not to repeat the past as the best way of dealing with the past. The point is that past violations cannot be attributed to one group; every one was involved with varying degree. This point also suggests the partiality of the prosecution process. Hence:

The solution should have been a political solution; we should not have followed the prosecution process; we should have pursued the truth and reconciliation way like South Africa.⁷³⁹

Considering the magnitude of violations committed and the deep-rooted social and political rifts that might have resulted, truth and reconciliation is thought as the best mechanism of rectifying past wrongs and building a new social and political system that departs from the past. The implication is that the prosecution process has failed to serve these two purposes.

government power. The army is subordinated to civilian government. So, it is necessary to have rule of law; guaranteed rule of law is necessary.”

⁷³⁸ Anonymous R39, Above n 725

⁷³⁹ Anonymous R39, *ibid.* Some of the accused have argued along this line in their preliminary objection to the charges of the SPO. See a preliminary objection presented against SPO charges December 1990 E.C.SPO file No.62/85 (copy with the author). The argument is that one cannot put a revolution on trial.

In this connection, a resident in Mekelle claims that many people view the whole process as motivated by revenge and not justice in the following terms:

Do you think this process was designed to do justice? Do the people believe this government was doing justice? I do not think so. It was rather revenge against the Dergue for what it did. People see it as revenge. In the past, new leaders used to kill or imprison former leaders. It is the same this time around except that the current leaders do it in the name of law or justice. People do not see it as a justice process but as revenge.⁷⁴⁰

This clearly questions the government's motivation of action, and suggests that the public view the process as not appropriate to deal with the past. The prosecution process had even led to the detention of people for many years without bringing them to a court of law, and this is not justice at all.⁷⁴¹ Reflecting on what would have been better; he opined that "may be some reconciliation was important because people are still divided because there was no reconciliation".⁷⁴²

A resident in Addis Ababa similarly noted the significance of reconciliation as a best way of dealing with the past.

The Dergue has killed thousands of the youth and the educated. It killed not only members of opposition political groups. It also killed many of its own members. Other parties also killed the Dergue and the Maison and their supporters. Even members of a family killed each other. It was a time of madness. Although most of these were committed in Addis Ababa, there were killings, torture in other parts of the country. Is it possible to prosecute all perpetrators? Therefore, for me, reconciliation was better to bring people together, forgive each other, and let their children learn from this and live in peace.⁷⁴³

⁷⁴⁰ Anonymous R24. Interview with the author on 12 January 2012. Mekelle [cassette recording in possession of author]

⁷⁴¹ Anonymous R24, Ibid. According to this respondent, some members of the Dergue were detained in Desie town, in Amhara regional state, for more than ten years without being taken to any court, and some of them died in prison, and the rest were finally released after becoming too old.

⁷⁴² Anonymous R24, Ibid

⁷⁴³ Anonymous R15. 2013. Interview with the author, Addis Ababa, August 2013.

Other residents and respondents in the second category had more or less similar opinion.⁷⁴⁴ An example is the view of a respondent who underlined the need for justice but commented on the process adopted in Ethiopia in comparison with the South African process.

Normally, in such situation one would want justice to be done and to bring perpetrators of some crimes to justice.... Strangely enough at that time,...we had two quite different views of all human rights organizations and all the major European powers and the United States. If you remember it was about the same time, 1991 that in South Africa, the Apartheid regime was dismantled and there was more or less similar situation. There were terrible atrocities committed in South Africa. I was at that time the Head of [a domestic non-governmental organization], and I found it strange that almost all Western governments and human rights organizations insisted on justice in Ethiopia while they were insisting on reconciliation in South Africa. Therefore,, I did not subscribe to their views, I was against.⁷⁴⁵

This view generally recognizes the need for justice in light past atrocities committed in Ethiopia. However, the criticism and rejection of the prosecution process emanates from the unevenness of the international community in influencing national processes of accountability. One may however ask, apart from the issue of double standard, the extent to which the international community may influence national processes. For the above respondent, as opposed to the views in the first category, there was a similar situation in both Ethiopia and South Africa, and hence requiring similar transitional processes of accountability.

The criminal prosecution was also viewed as vindictive and a reflection of the racial bias of the international community, and hence unacceptable:

I was against this so-called justice, which is vindictive. I insisted on the other hand why would not be it possible to view the Ethiopian situation in the same way as the South African situation. Why would not we have peace and reconciliation commission established here? I am sure the crimes committed in Ethiopia would not

⁷⁴⁴It is needless to present these views, as they do not substantially add to this study.

⁷⁴⁵Anonymous R1. Interview with the author on 17 December 2012. Addis Ababa. [cassette recording in possession of author]

be worse than the crimes committed in South Africa for decades. Therefore, I saw that as a racial bias and I still believe it was a racial bias because the perpetrators of crime in South Africa were whites and so they wanted each white to be saved from the sword of justice. But, whereas here, it was Africans against Africans, so they wanted, insisted on justice, and I was against it.⁷⁴⁶

This opinion highlights, first, the vindictiveness of the prosecution process, and hence the adoption of such conception of justice was not proper. As discussed in chapter 4, such a perception of transitional justice processes is counter-productive. Secondly, it underlines that the situations in Ethiopia and South Africa were similar requiring similar solution. As discussed earlier, such a view is contested by respondents in the first category.⁷⁴⁷ Thirdly, it accuses the international community for influencing the national framework and having no objective standard; even worse, the accusation is that it is racially driven. These latter points might question the extent to which local voices and needs were articulated or neglected. These contestations would normally point to other processes, and hence peace and reconciliation was considered as a better option.

The actions of the Ethiopian government might also serve as a ground for rejecting the prosecution or the judicial process, as noted below:

On the part of the government too, there were problems; the regime in Ethiopia that is EPRDF. What it considered violation or crimes against humanity is only from the side of EPRP. EPRP was equally guilty of committing crimes. They exonerated EPRP and in fact, some EPRP members... joined the government of the Woyane. So it became farcical. It was only what the Dergue and the Maison committed that [was] considered as crimes and so the whole thing as far as I am concerned was not right from the beginning.⁷⁴⁸

As discussed in chapter 3, transitional justice processes should be even-sided and address all perpetrators irrespective of their political affiliation. The above rejection of the prosecution process emanates from the narrow definition of wrongdoers in the framework, the view being

⁷⁴⁶ Anonymous R1, Above n 745.

⁷⁴⁷ Examples include Anonymous R2, Above n 697 and R4, Above n 689.

⁷⁴⁸ Anonymous R1, Above n 745.

that the central problem with the prosecution lies in its partiality. This demonstrates the importance of even-sidedness in determining crimes or perpetrators that should be subjected to transitional justice process, an issue discussed in chapter 3. Clearly, the above view suggests that the incumbent exonerated EPRP from prosecution.⁷⁴⁹

Briefly, the second category rejects prosecution as an appropriate remedy to past violations in Ethiopia based on its scope, actual operation and consequences. We also noted that they emphasize that truth and reconciliation, or peace and reconciliation was the proper mechanism of dealing with Ethiopia's past, which is rejected by some respondents in the first category. Some reflection on these views is offered at the end of this sub-section. We now turn to the mixed perspective.

The Mixed Perspective

The mixed perspective favours a combination of both prosecution and reconciliation as the appropriate way of dealing with the past. The mixed perspective arises from the doubt whether full-scale prosecution is either possible or desirable in addressing past violations, and hence suggests a combination of mechanisms. This is clear from the following view, which while recognizing past violation and the need for accountability, questions whether prosecution across the board was a good choice.

The stand taken on accountability was proper. However, these acts were committed over 17 years. There were many actors involved in these acts, perhaps in different capacities....Some made policy decisions, creating ideas and convincing others to act accordingly; and others at the bottom had implemented specific measures; so there were many steps. As the violations were state sponsored and committed by using state structures, so many people were involved. In addition, what the government did was to bring to judicial process all people in mass, in their thousands, that were allegedly participating in one way or another in the violations committed over the 17 years of the Dergue regime. Moreover, there were situations where individuals were arrested

⁷⁴⁹ This issue is analyzed in more detail in the sub-section dealing with inclusiveness of the process. Some respondents from the first category responded to this view by saying the emphasis was on state machinery, and that the crimes committed by EPRP or other political groups were very limited.

for similarity of names. In such a situation, was wholesale prosecution the appropriate choice?⁷⁵⁰

This view questions not prosecution per se but wholesale prosecution. The question arises due to the magnitude and number of participants. Is the judicial process capable of dealing with such magnitude of crime and huge numbers of alleged perpetrators? As discussed in chapter 4, it might not be possible or even desirable to prosecute all perpetrators. Other problems that might arise from the actual operation of prosecution process were highlighted including unjustified detention, the effects on speedy trial, and the institutional capacity of justice organs. These problems give rise to the following questioning:

Was not it easier and appropriate to select and bring those who were involved in a clear and consistent pattern of violation to justice? And was not it appropriate to deal with the rest through other mechanisms of justice by creating conditions for the perpetrators to publicly acknowledge their crimes, to apologize either through mass media or by appearing at places where they committed crimes and then clearly express their remorse?⁷⁵¹

This questioning suggests a preference for a combination of prosecution, and truth and reconciliation processes or the need for complementary mechanisms of dealing with the past. The inadequacy of wholesale prosecution in Ethiopia was identified as follows:

The process turned out to be boring, the public felt hopeless and lost interest; witnesses and victims or their relatives were fed up of attending courts; and I do not think, after 10 or so years, many people attended the proceedings when the court passed judgement. In the beginning, it was considered such a big miracle that there were too many people, victims' families, and foreign media so that one needs [entrance card] to attend the proceedings. After a year or two, journalists and people slowly begun not showing up, and only victims or relatives were attending. After 5 or 6 years, it was just a proceeding between the SPO, the judges and the accused with no

⁷⁵⁰ Anonymous R10, Above n 713. One former high court judge, the second respondent in this category – R20, and one respondent from the first category – R31 (a supreme Court judge) , stated similarly that some people were detained for 8 to 12 years because of mistaken identity.

⁷⁵¹ Anonymous R10, Above n 713.

victims' families because some of them lost hope, others died, and others were fed up of the process.⁷⁵²

Clearly, these negative effects attributed to wholesale prosecution relate to the problem of delay, which is also recognized by the first two categories of respondents.⁷⁵³ Hence, according to the above third category respondent, "... that type of course of action [wholesale prosecution] was not a much needed choice".⁷⁵⁴ This together with the above comments about wholesale prosecution suggests the need for a combination of processes. However, the idea of 'wholesale prosecution' used here is different from that discussed in chapter 4. In this context, it refers to prosecution of all Dergue members while the theoretical discussion related to prosecution of all perpetrators irrespective of their political affiliation (which was not the case in Ethiopia). Nevertheless, such distinction would not have affected the contents of the above response.

Another respondent expressed more or less similar views. In light of the history of the country, the prosecution process was thought to be acceptable:

At the time, it was the winning/victorious force that came to power. This force could have done whatever it wanted. It was good that this force thought about calmly and handled the matter through a legal process. It was appropriate. It was different from previous practices of summary execution, especially in light of the nature of this force that came through armed struggle.⁷⁵⁵

However, further questioning whether other options were appropriate compared to prosecution followed this appraisal of prosecution:

⁷⁵² Anonymous R10, Above n 713. This will be discussed in more detail when we talk about the problems in the process.

⁷⁵³ Anonymous R11, Above n 712; Anonymous R31, Above n 713. Both of them stated lose of hope and interest on the part of victims' families, witnesses and the public. R11 commented "the attendants of the trial were very very few people; actually towards the end there was no audience at all." He attributes these problems to bad organization of the prosecution process, which may include lack of selectiveness. A former supreme court judge also stated the process took a very long time leading to lose of interest on the proceedings. See Anonymous R2, Above n 697

⁷⁵⁴ Anonymous R10, Above n 713

⁷⁵⁵ Anonymous R20. Interview with the author on 18 December 2012. Addis Ababa. This view overlaps with the view of former SPO in the first category.

Then, as a country, one may think whether it was possible to go beyond that. I think, it would have been better for us to have truth and reconciliation. That was a better option. Why? It is because many things were not disclosed, and they remained unknown. When you have prosecution, people will not tell the truth for fear of punishment. If a different track was followed, people will feel free to tell the truth, and we would have known the truth. We had lost that opportunity.⁷⁵⁶

Here, we see the argument in support of truth and reconciliation based on the need to establish the truth about the past. The truth of the past is equally important, and he thought prosecution could not serve truth, and the country has lost something by adopting prosecution rather than truth and reconciliation. This reinforces the criticism that the judicial process or prosecution is not an appropriate mechanism of discovering and establishing the truth, as discussed in chapter 4. It rather considers that truth and reconciliation commissions are the best institution for the task; whether this is true is itself a subject of debate as we have seen in the theoretical discussion in Chapter 4.

It is clearly observed that prosecution process could not lead to the discovery of the truth:

In court, you win a case. However, winning the cause is better. In court, you have winner and loser, and there is a possibility for saying the truth is the truth of the other. Prosecution cannot disclose the full truth, and if you want to give lesson for the new generation, a lot more is needed.⁷⁵⁷

Although the above opinions tend to support only truth and reconciliation processes, the respondent ultimately seemed to accept a combination of prosecution and truth and reconciliation: He reiterated, “at least, it was possible to handle some through prosecution and others through truth and reconciliation.”⁷⁵⁸ However, compared to the previous respondent’s view, the latter one is apparently more inclined to truth and reconciliation.

Arguably, a chain of political problems in Ethiopia can be observed as continuing as no lesson was derived from the past:

⁷⁵⁶ Anonymous R20, Above n 755

⁷⁵⁷ Anonymous R20, Ibid. The issue whether the truth has been established will be discussed in chapter 6.

⁷⁵⁸ Anonymous R20, Ibid.

The Hailesillasie regime was removed by a generation that had no clear philosophy. There were moments of division and animosity among political parties. The Me'son did many wrongs. It is not appropriate to hold the Dergue alone responsible. We still have not drawn a lesson. 99% of the opposition think of removing EPRDF from power. Where do you head thereafter? It is unknown. That was what happened during the Dergue. We have not taken any lesson. The other point of failure to take lesson happened in the 2005 election. There were many wrongs. The opposition was talking of suing the government and so on. Nobody talked about tolerance and reconciliation.⁷⁵⁹

This point emphasises the connection between the past and the present, and clearly suggests the failure of the prosecution process to bring about effective transition. It points to the absence of dialogue, tolerance and reconciliation. An obvious implication is the perpetuation of the political culture of suspicion, exclusion, animosity and conflict; pointing out that there is no departure from the past, which transitional justice processes aim at.

Thus, arguably truth and reconciliation process would have solved the problem:

It would have rather been better if we adopted the truth and reconciliation path. We could have learnt a lot, more truth could have been discovered; many books could have passed to the new generation for lessons. Now, the convicts were released. So, what?⁷⁶⁰

Like the first respondent, the arguments in support of truth and reconciliation are also based on the length of time of the judicial process, unjustified detention of people, and the lack of capacity/competence in the justice machinery.⁷⁶¹ A resident in Addis Ababa likewise supports the prosecution of top leaders of the Dergue and reconciliation processes among the remaining Dergue members and victims or families.⁷⁶²

⁷⁵⁹ Anonymous R20, Above n 755

⁷⁶⁰ Anonymous R20, *ibid*

⁷⁶¹ Anonymous R20, *ibid*

⁷⁶² Anonymous R12. Interview with the author. June 2013. Addis Ababa. [Cassette recording in possession of author].

This third category of respondents seems to take a mid way between the first and second category respondents. They support a combination of prosecution and truth and reconciliation sometimes with overlapping reasons. It is also quite interesting to see the existence of differences in reasoning as well as the tendencies of preferences. These views argue that prosecution alone was not the appropriate solution, and argue in support of dual processes of transitional justice.

One central point in the response of the third category is the differential treatment of past violators. Hence, considering the magnitude of the violations and the need for more truth, the respondents support the selective prosecution of top leaders, policy makers, favouring truth and reconciliation process for the rest. However, a former SPO prosecutor rejects the idea of selective prosecution in the following manner:

From the perspective of serving justice, to limit prosecution to the top leaders would have compromised justice. For a mother whose son was killed by Kebele[lowest administrative organ] officials, would it be justice to prosecute the top leaders alone; I think that would be unjust. I think justice demands treatment of all equally. How do you select among the different violators? A criminal case is an issue of individual responsibility; rather than an issue of position, it is an issue of individual criminal responsibility. Secondly, one has to consider the issue from the perspective of the victims.⁷⁶³

According to this view, justice requires the prosecution of all perpetrators from top to the bottom. Selectiveness refutes justice, and so when seen from the perpetrators or victims, justice requires equal treatment. However, one may question whether wholesale prosecution is desirable or possible. Most of the respondents in the first category acknowledged that it was impossible to prosecute all perpetrators.⁷⁶⁴ Nevertheless, the opinion of the SPO above reflects the notion of equality in criminal justice, and underlines the importance of prosecuting everyone. A counter-argument could be that this is impossible practically and undesirable in light of a broader conception of justice. A former SPO prosecutor also argued

⁷⁶³ Anonymous R6, Above n 686

⁷⁶⁴ Anonymous R4, Above n 689; Anonymous R2, Above n 697; Anonymous R6, Above n 686; Anonymous R3, Above n 682. All of them admitted the limits of prosecution for lack of evidence or other reasons. A senior government official stated that “it would be a lifetime task and resource consuming if all perpetrators are to be prosecuted.” They nevertheless underline the importance of prosecution, and even argue that those not prosecuted today for lack of evidence can be prosecuted any time when evidence is secured.

that reconciliation is incompatible with prosecution underlining the appropriateness of prosecution.⁷⁶⁵ This assumes a trade-off between prosecution and reconciliation.

To conclude, in this sub section the issue of appropriateness of prosecution in dealing with past violations was considered. The question is whether the choice of prosecution was made deliberately and with care. The existing data shows there were different opinions on the appropriateness of prosecution as a modality of dealing with the past. The first category of respondents opined prosecution was the appropriate modality of dealing with the past and rejected truth and reconciliation. According to the views of respondents in the second category, truth and reconciliation process was understood as the best mechanism of dealing with the past. It was considered at least as a complimentary mechanism of dealing with the past - once the prosecution process was completed. The third category of respondents view a combination of prosecution and truth and reconciliation was appropriate. These diverse views, in category two and three, clearly demonstrate, as opposed to the views in the first category, that prosecution alone or as formulated and implemented in Ethiopia was not the appropriate solution to our past. This author would like to highlight some points that suggest the problematic nature of the Ethiopian transitional justice framework.

First, in light of the history of violation discussed in chapter 2 and reaffirmed in this chapter, one may question the appropriateness of prosecution as the sole solution to the past. Clearly, enormous violations were committed over a period, where we had too many victims and perpetrators. In view of resource constraints and other technical matters (for example the availability of evidence) within the country, wholesale prosecution of all past violations could not have been possible. This may however calls for a combination of transitional justice process. In light of this, the Ethiopian transitional justice process is arguably problematic due to its failure to adopt a comprehensive mechanism of dealing with the past.

The other point worth noting is that there has been deep-rooted ethnic, social and political division and animosity within the country. In such context, coming to terms with the past and building a better inclusive social and political system apparently requires some form of acknowledgement, forgiveness and reconciliation. It is clear that respondents from the first

⁷⁶⁵ Anonymous R6, Above n 686

category also recognize the importance of reconciliation or at least some form of it.⁷⁶⁶ The significance of reconciliation was clear. However, the Ethiopian transitional justice process did not incorporate a policy of reconciliation. Hence, we understand, from the data presented, that communal and political rifts, suspicion and polarization still perpetuate in Ethiopia, preventing effective transition.

We should also note the view that the Ethiopian transitional justice process emphasises on punishment, or revenge. As already discussed in chapter 4, the conception of justice of the incoming leaders or regime might affect transitional justice process. Hence, we might say the conception of justice adopted in the Ethiopian transition prevented any process of reconciliation. It might be useful here to note the government's refusal to pay attention to the call for reconciliation. If the government wants to end cycles of violence and build a new system, why should not it pursue some reconciliation process, even after the prosecution process, which promotes mutual trust, dialogue and accommodation of differences?

Another important point that challenges the transitional justice framework is its partiality in defining victims or perpetrators, which will be dealt with in the next section. However, this point may be relevant here because the proper definition of perpetrators could have suggested that everybody was involved and as such, the solution could have been different.

We can also understand that the implementation of the prosecution process appears to be diluted with serious problems. The views that the trials were badly organized, with increasing loss of public attendance, the lack of sufficient evidence, few prosecutions, and the like seriously contest the appropriateness of prosecution and suggest a different course should have been adopted. The abovementioned points might have also implication on the outcomes of the process and question whether Ethiopia had effective transition.

⁷⁶⁶ In this respect, the response of former SPO supporting reconciliation as a complementary measure, and a Supreme Court judge supporting individual or community level reconciliation should be kept in mind. We should also take note of earlier views of a senior government official who acknowledged the importance of reconciliation in preventing further conflict but argued any effort outside of the law does not work.

5.2.2.2 Public participation in the design of the legal framework

As discussed in chapter three, transitional justice processes should be participatory and all-inclusive in terms of decision-making, thereby deriving their legitimacy from the will of the people. In light of this, the other inquiry relating to the Ethiopian transitional justice process is whether the framework for prosecution was designed through public participation. Respondents were asked how the legal framework was designed in the sense of whether there was public participation in the design of the framework. Although possibly diverse responses were expected, all the respondents replied that the government or EPRDF formulated the framework. We recall from chapter two that the government at the time was a transitional government composed of representatives of political parties and not that of the people. It is also clear from the analysis in the preceding section that what the government decided was met with both approvals and rejections.

None of the respondents claimed the existence of public discussion or participation on the issue of how to deal with the past. Most of the responses also do not explicitly address the issue of public discussion and participation. Rather, they choose to respond that it was simply the government that designed the framework. However, some respondents opined that victims and their families organized anti-red-terror campaigns demanding the government to bring perpetrators to justice.⁷⁶⁷ A document published by the SPO in 2002 E.C also notes this victims and relatives call for justice, and that the government had no choice but to create the necessary institutions for prosecution.⁷⁶⁸ Some respondents had clearly indicated that there was no public participation and the government alone formulated the framework. In expressing the lack of public participation, a victim and former Minister has opined that;

Were the activities of the public prosecutor participatory? The activities were not nationwide; it was not like a storm/wave. Did the Ethiopian public follow the prosecutions? Most people do not know. How many people in the rural Ethiopia know about the red terror trials? Only few people know.⁷⁶⁹

⁷⁶⁷ Anonymous R4, Above n 689; Anonymous R2, Above n 697; Anonymous R3, Above n 682; Anonymous R6, Above n 686; Anonymous R10, Above n 713; Anonymous R20, Above n 755

⁷⁶⁸ See SPO, “Dem Yazel Dose”, January 2002 E.c, Far-East Trading Pvt.Ltd, Addis Ababa.

⁷⁶⁹ Anonymous R39, Above n 725. This view is shared by a resident in Addis Ababa, who noted “apart from some media coverage, there was no public discussion on what should be done.” Anonymous R14, Interview with the author on 16 January 2014.

Although the opinion directly relates to the activities once the framework was designed, it can also be argued that this is a result of lack of participation in the design of the framework itself. A more direct criticism is expressed as follows:

The EPRDF exclusively established an office for the prosecution and there was no participation by the people, and it was not even reported well in the papers.⁷⁷⁰

Clearly, EPRDF, the incoming government, is singled out as the sole formulator of the framework. It was clear the EPRDF had a majority of seats in the Council of Representatives during the transitional period when the SPO proclamation was issued. A similar observation is offered in the following manner:

They [EPRDF government] had some propaganda...they play to the parents of the victims or relatives of victims; they had some discussions within themselves but not really general discussion.⁷⁷¹

This is a clear expression of a lack of general public discussion and participation, apart from some limited discussion and consultation with victims groups. The existence of talks between the government and victim groups is also evident from the responses of other respondents who said the government and victims groups worked very closely particularly during the initial phase of the prosecution process.⁷⁷² However, this too seems problematic in view of the opinion that ‘victims of the EPRP were never considered’.⁷⁷³

To conclude, the data presented reveals that there was no general public discussion on the issue of how to deal with the past. The discussion in chapter two clearly demonstrated that the transitional government was not composed of peoples’ representatives, as there was no election; and rather it was composed of representatives of political parties. In light of these factors, the Ethiopian transitional framework of dealing with the past lacks public discussion and participation.

⁷⁷⁰ Anonymous R11, Above n 712

⁷⁷¹ Anonymous R1, Above n 745

⁷⁷² Anonymous R4, Above n 689; Anonymous R2, Above n 697

⁷⁷³ Anonymous R1, Above n 745

5.2.2.3 On inclusiveness

Another critical point discussed in chapter three that has relevance to the Ethiopian transition is the definition and scope of wrongdoing and wrongdoers to be subjected to the transitional justice process. Inclusiveness, here, refers to whether the legal framework was broadly designed to address all violations/perpetrators of the past. This issue arises once prosecution is set as a modality and particularly refers to the definition of violence/perpetrators that falls under the jurisdiction/mandate of the SPO. Clearly, Article 6 of the SPO proclamation mandates the SPO to investigate and institute proceedings in respect of members of the Derg and its affiliates that have committed offences. Thus, respondents were asked of their opinion on the appropriateness of such selective prosecution. A closer consideration of the data shows three categories of responses: (1) The inclusive-broad perspective, (2) the limiting prosecution argument, (3) the argument of partiality and inappropriateness. I would present and analyze, below, these different views on the issue of inclusiveness and implications for transition.

The first category: The Inclusive-broad perspective

In this category, we have respondents who claim that the framework addresses all perpetrators irrespective of their political belonging, and thus was proper. According to this view, the framework was broad enough to investigate and prosecute past violations irrespective of who committed them. In light of Article 6 of the SPO proclamation, this view is apparently wrong. However, the important question then is why this view is asserted. Thus, it is useful to see some responses because of the significance of their implications.

A former SPO prosecutor, opined that:

We were very mindful of this [on the possible involvement of non-Derg political groups in violations]. In this respect, I want to assure you one thing. The framework does not exclude the right or the left. It was not narrow. It is another thing to question whether it was narrowly practiced /implemented. There is absolutely nothing that makes the framework [narrow].... The issue of exclusion is naive; and as I told you such thinking results from failure to properly follow the

matter [or actual process]. Thus, there had never been such prohibition either in policy or law; never in law or in the practice of the SPO. It was all-inclusive. Absolutely nothing...this party or that party...⁷⁷⁴

This clearly asserts the definition of perpetrators or crimes is provided without regard to political belongingness. This is clearly wrong in light of the provisions of the proclamation. However, the former SPO, insists that the prosecution was all-inclusive both in its framework and in practice; and that nobody was immune from prosecution and thus the framework is beyond criticism.⁷⁷⁵ Interestingly, however, this view acknowledges that other political groups did commit violations.

Another former SPO prosecutor also underlined the all inclusiveness and appropriateness of the framework but in a slightly different way:

The framework was inclusive. EPRP was not an official party. Its members were either killed or forced to flee abroad. Who was to be brought to justice? The Me'son people were involved in crimes along with the Derg; they were prosecuted not because of being Ma'son but for their crimes. EPRP members who turned to Derg membership were also prosecuted. It is quite a different issue to ask why EPRP and other political groups were not prosecuted as an institution.⁷⁷⁶

The interesting point is that former Special Public Prosecutors are the ones who gave the above views. It might be presumed that both must have knowledge of what happened in the past as well as in the actual investigation and prosecution of past crimes. Both of them must have recognized that political groups other than the Dergue were also involved in past violations, and must have considered the need to prosecute without consideration of political affiliation. However, there is no evidence whether they in fact prosecuted members of other

⁷⁷⁴ Anonymous R3, Above n 682. However, the provisions of proclamation does not say so

⁷⁷⁵ Anonymous R3, Above n 682. He noted "The legal framework never excluded any one from prosecution, investigation. It gave impunity to no organ.... In fact, Derg was investigated for killings and being killed. EPRP was investigated for killing and being killed. Me'son was investigated for killing and being killed. One who says he was a member of EPRDF was investigated for killing and being killed. Of course, there are circumstances that the framework had excluded, and that are acts taking place in military showdown.... Apart from these, the framework never excluded any organ. One practical example was the case of Girma Kebede- where a Derg member was investigated for killings, and acts directed against him were at the same time investigated."

⁷⁷⁶ Anonymous R6, Above n 686

political groups unless such member had later turned to be Dergue or collaborated with the Dergue in a different way as remarked earlier. Even then, one may ask of the consistency of such practice with the provisions of the SPO proclamation. Does the legal framework support their claim? Clearly, this is not because the SPO mandate is limited to crimes committed by the Dergue or its affiliates.⁷⁷⁷ However, one may argue that the proclamation does not prohibit such investigation, although it did not clearly authorize so. Nevertheless, what is interesting for this researcher is the fact that both SPOs were mindful of violations committed by other political groups apart from the violations committed by the Dergue and its affiliates. Thus, the logical conclusion of the above views is that transitional justice process that excludes other political groups is not proper.

The second category: The limiting prosecution argument

In this category, we have respondents who stated that the legal framework addresses violations by the Dergue and its affiliates nevertheless argue that it was proper to do so. According to this view, limiting prosecution to the Dergue is appropriate. Some typical responses are presented below.

A victim's family who supported the prosecution process noted, "it was the Dergue that was massacring people and hence no one else would be responsible".⁷⁷⁸ For this victim's family, the Dergue was the only violator that deserves prosecution. However, considering the discussions in chapter two, while the fact that the Dergue was the main violator cannot be denied, the question is why such a view of the past of violence is held. Some residents of both Addis Ababa and Mekelle viewed this emphasis on the Dergue as appropriate for similar reasons.⁷⁷⁹

A former judge, who presided over the Dergue trials, remarked that:

I think it [the framework] was broad. I would not say I have specialized knowledge in that line. But looking from the practitioner's point of view, I think the mandate given

⁷⁷⁷Proclamation No.22/1992; Article 6

⁷⁷⁸Anonymous R8, Above n 704

⁷⁷⁹ Interview with anonymous respondents R13, R33, R 32, and R17 exemplify this position. The responses of these and other respondents is not presented here because their opinion, apart from supporting the above views, does not add any further substantial insights.

to the SPO was broad. The mandate was broad enough to cover all sorts of crimes committed during the Dergue regime and to bring to justice all perpetrators ranging from the rank and files to Kebele guards, and also as a result of the suspension of period of limitation. Apart from technical and practical/implementation issues involved, I do not remember of mandate limitations as a problem at all times in the entire process.⁷⁸⁰

This broadness of the framework, it is worth noting, relates to violations committed by the Dergue and not to other political groups. The main justification for limiting prosecution to the Dergue is that the Dergue was the main violator by using state and public resources, as observed in the following view:

At that time the main focus and the main problem was the state structure; I think the state structure was the perpetrator of the biggest crime. Apart from that, a crime may be committed at any time. Is it not? It was committed individually before and today. Crimes committed by individuals were not barred from prosecution by this government or any government. In my view, what deserved organized and special solution...attention was the prevention of mass killings by using state structure and state and public resources.⁷⁸¹

Arguing ‘other crimes’ can be addressed through ordinary criminal justice institutions and procedures, this former judge insists on the appropriateness of focusing on the Dergue.⁷⁸² Although the argument supports the focus on the state machinery, there is a hint of incompleteness in that respect too:

The big problem was State sponsored human rights violations. What I tell you is not that the others are less important. The biggest problem in Ethiopia at the time was state sponsored violation where 500,000 people were killed. I do not know of the

⁷⁸⁰ Anonymous R2, Above n 697

⁷⁸¹ Anonymous R2, Above n 697

⁷⁸² Anonymous R2, Above n 697. The respondent noted, “Apart from that [crimes committed by the state], other crimes are crimes. They need a response. That is not closed. It is closed neither today nor in the past. If someone alleges that somebody has killed my relative or family [*egelle egellen gedilobiya kale*], he could have reported to police institutions. I think, the focus was on the complex ones. Sometimes, it may possibly be said to be incomplete. But, the main focus was on state sponsored human rights violation.”

number on the side of what is called other part [group], if it exists at all. I believe it is good to see it from that perspective.⁷⁸³

This view appears to be the very premise of the prosecution framework as evidenced by the provisions of the SPO proclamation. The Dergue was the main violator using the state apparatus, and hence deserve prosecution. It is also interesting to note that violations committed by other groups are recognized as not less important; the view is simply that they can be dealt with the ordinary procedure. However, the extent of violations committed by other groups, if any, is not known. What does this tell us? How can one relegate violations committed by other groups without even knowing the extent? Would not the exclusion of other groups open the framework to criticism?

Another respondent briefly presented a similar opinion in the following manner;

Political groups outside the Derg were not brought to justice. We have seen few acts. There was an act directed against Megistu; but they were very limited events to be given focus. The focus was on the state machinery.⁷⁸⁴

A senior government official also aired a similar opinion.⁷⁸⁵ However, he underlined the difficulty of prosecuting each crime.

...You cannot proceed with all acts and all people; if you want to do that all other works are to be ignored; you dedicate your life to chasing and capturing suspects in each locality and district. So, the objective was let us condemn the system and at the same time bring top leaders to justice. It is impossible to go after each case during the Dergue.⁷⁸⁶

This view alludes to the practical impossibility to investigate and prosecute all Derg members who had committed crimes over the 17 years, and thus the argument is that the purpose

⁷⁸³ Anonymous R2, Above n 697. This researcher raised to the respondent, in light of uncertainty on the number of crimes committed by others, the issue of why didn't we subject all groups to the same process of accountability like what happened in South Africa. He replied, "I understand that; each country has its own different context. That was a result of negotiation...The case of negotiation and loser is not the same."

⁷⁸⁴ Anonymous R5, Above n 719

⁷⁸⁵ Anonymous R4, Above n 689

⁷⁸⁶ Anonymous R4, Above n 689

sought by the framework was not to prosecute all Derg members involved in crimes but to, selectively, prosecute the top leaders. However, this is inconsistent with the legal framework that was in place, as the framework does not make distinctions among Dergue members.

While prosecution of the Dergue was justified, some respondents treated questioning the framework for excluding other political groups as unfair. For example, a senior government official commented:

Regarding other political groups, I think the question is not fair. Why were others excluded? I do not think it is fair to ask. They are ordinary criminals. At that point, we were concerned with a political party that was in power; the one that used the state machinery; individual criminals can be brought to courts.⁷⁸⁷

Another respondent, a victim's brother, stated that the Dergue was the main perpetrator and therefore needed emphasising.⁷⁸⁸ However, he acknowledged the participation of another political group in the violence:

At the time, the Dergue hired Kebele guards, which were targeted by the EPRP. I do not know what the EPRP get by killing Kebele guards. That was the white terror. Rather than detaining, the EPRP begun to kill what they considered important people. The purpose of the white terror was to keep the Dergue alone by threatening people to distance themselves from the Dergue.⁷⁸⁹

Although the respondent noted the role of at least EPRP in past violence, he nevertheless supports the selective prosecution of the Dergue. How can this be justified in light of EPRP's white terror campaign, which were not confined to isolated acts of killing people. Why should not this be investigated and prosecuted?

A Supreme Court judge in this category, who had a more or less similar opinion on the appropriateness of the mandate given to the Special Public Prosecutors, deserves a final

⁷⁸⁷ Anonymous R4, Above n 689. The respondent felt emotional and angry when questioned about the accountability of other political groups. In an interview made with R1, the latter commented that "R4 is one of EPRP members who had joined the EPRDF government." Whether the emotions were triggered because of such implied accountability remains. However, the author could not insist on the issue for fear of his authority.

⁷⁸⁸ Anonymous R38, Above n 691

⁷⁸⁹ Anonymous R38, Above n 691

consideration.⁷⁹⁰ He stated, “the power granted to the SPO was appropriate although there might be questions as to how it was exercised.”⁷⁹¹ Regarding other political groups, this respondent opined that:

Yes, there were violations by non-state actors. Other political groups did take measures not only in battlefield but also in towns; this is known. A son whose father was killed by EPRP knows that it was not only the Dergue that killed; the son knows; the society knows. Although summary killings were committed in this country by the government, it is also important to reveal what other political groups did. It is good to show what they did was also wrong. However, Dergue’s violation was grave. Dergue did not only kill a person; it exterminated a generation. That has been established through a judicial process. That was the focus of the framework.⁷⁹²

The similarity of this view with the other responses is clear in that he considers the framework appropriate for its focus on the state machinery. What is interesting here is the clear acknowledgement that other political groups did commit violations, and that the families of the victims and the society knows this well. The need to reveal such violations and to acknowledge that they were wrong is also recognized. This clearly contests the appropriateness of the legal framework in excluding such other violations.

In conclusion, the above responses argue that the mandate given to the SPO was appropriate irrespective of its focus on the violations of the Dergue alone; the view is that the focus on the Dergue was proper, as the State was the biggest perpetrator of crimes using state machinery and public resources. The majority of respondents also acknowledge that violations committed by other political groups needed a solution with differences of opinion on the actual commission of such crime and its extent, and on the available remedy. It is also

⁷⁹⁰ Anonymous R31, Above n 713

⁷⁹¹ Anonymous R31, Above n 713. He stated these practical problems in the following way; did the framework authorize mandatory prosecution or discretionary? How did they exercise it? The Office claimed that its role was to prosecute all; the court should see all. Was the Office effectively organized in carrying out its functions? This should be seen in light of the nature of the crime, the nature of the perpetrators, the magnitude of the crime...There was lack of prosecutorial system strategy....There was no need for prosecution across the board.

⁷⁹² Anonymous R31, Above n 713. But there seems to be inconsistency between saying there is a need to reveal and condemn what others did and saying the framework was appropriate

interesting to note that the majority of respondents, all except one, in this category had argued prosecution was an appropriate mechanism of dealing with the past.

Third category: The argument of partiality and inappropriateness

Respondents in this category argue that, as the framework addressed only violations of the Dergue and its affiliates while excluding the violations of other political groups, the framework was thus not appropriate to the transition process; the process is partial and this renders it inappropriate. Some typical responses are presented below.

According to a respondent, who argued for a combination of alternatives, the framework for prosecution was not all-inclusive.⁷⁹³ He opined, “it is not appropriate to hold the Dergue alone responsible.”⁷⁹⁴ He further remarked that:

There is a feeling of victor’s justice. If others were also included, we would have a fuller picture. In fact, there were other groups [that] have committed wrongs/crimes. If we had included them, it would be possible to say that we were searching for justice.⁷⁹⁵

This emphasises the need for inclusiveness or broadness; the exclusion of other political groups may give rise to the perception of the whole process as victor’s justice. We recall that such a danger is recognized as being necessary to avoid, as discussed in chapters 3 and 4. This former judge responds to the view of respondents in the second category, underlining the importance of emphasizing on state violations, arguing that “while the emphasis on the Dergue may be appropriate, excluding others from the framework has limited the search for justice.”⁷⁹⁶ For this respondent, all perpetrators should have been brought to justice, although not necessarily to judicial process.⁷⁹⁷

⁷⁹³ Anonymous R20, Above n 755

⁷⁹⁴ Anonymous R20, *ibid*

⁷⁹⁵ Anonymous R20, *ibid*. The respondent also commented on the practical problems in implementing what the framework allows; including detaining people for a long period without evidence; and the failure to prosecute those who deserve prosecution according to the framework.

⁷⁹⁶ Anonymous R20, Above n 755

⁷⁹⁷ One should note that this respondent preferred a combination of prosecution and truth and reconciliation. Hence, it may be argued that members of other political groups who committed violations could have been dealt with through either of these processes.

Another respondent rejected the whole process for its partiality in the following terms:

On the part of the government too, there were problems,... What it considered violation or crimes against humanity is only from the side of EPRP. EPRP was equally guilty of committing crimes. They exonerated EPRP and in fact some EPRP members became, joined, the government of the Woyane. So it became farcical. It was only what the Derg and the Me'son committed that [was] considered as crimes and so the whole thing as far as I am concerned was not right from the beginning.⁷⁹⁸

This clearly suggests that the process was not inclusive. Interestingly, other political groups were viewed as equally responsible for violation, though they were not held accountable. The following opinion reiterates this point:

When you say Maison kills, that is a crime; EPRP kills, that is okay, then you have created no standard for the society as a whole. It is basically a continuation of the same thing with the actors perhaps changing.⁷⁹⁹

This view is consistent with the argument that transitional process of accountability ought to lay down new standards for the society for the future as discussed in chapter 4. Hence, non-inclusiveness has negative implications - excluding/exonerating similar violators from prosecution might prevent effective transition. The argument that the Dergue, as opposed to EPRP, was a 'state' perpetrator therefore requiring separate treatment is totally dismissed as follows.

The conflict was really between Ma'son and EPRP. The Derg came in some what by default because both Ma'son and EPRP were trying hard (or doing their level best) to be friends with the Dergue; both of them. And in this process, they were competing against each other for favour with the Dergue, they were competing against each other for power within Ethiopia. And eventually, when EPRP declared its animosities, its disapproval of the Dergue, quite early in the game, then the Dergue had to support Me'son. Initially, it was not the Dergue that was killing. It was Me'son and EPRP that

⁷⁹⁸ Anonymous R1, Above n 745. I am repeating this quotation here due its relevance to the issue of inclusiveness

⁷⁹⁹ Anonymous R1, Above n 745

was killing. But gradually, Dergue and Me'son became merged and indistinguishable. At any rate, crime is a crime whoever committed it. And if they [the new government] wanted to institute a new system in Ethiopia, they should have watched all that.⁸⁰⁰

This is a complete rejection of the argument that the prosecution framework can be justified for its emphasis on 'state' perpetrators. The above view incidentally demonstrates a different version of the history of violence and who started the killings as discussed in chapter two. Irrespective of its correctness, this above view underlines the importance of dealing with all past violations irrespective of who committed it in order to create a new system. The failure to do so results in the following statements:

It was really what we call victor's justice. The EPRDF exclusively established an office for the prosecution... The attempt or concentration was really more on punishment... and revenge⁸⁰¹

It is discernible that the framework of prosecution was one-sided. However, the latter respondent is doubtful in expressing his opinion on the involvement (or the extent of involvement) of other political groups in past crimes.⁸⁰² There is an apparent effort to distance oneself from comparing the violations committed by other political groups to that of the Dergue. It is not stated that others did not kill. What is said is that the killings by others are not comparable with that of the Dergue.⁸⁰³ A respondent opined that:

With EPRP and Maison or the Socialist Movement, actually, they really killed each other; it is really horrible that what they have done to each other; some very close former friends in some cases. *It is so, the trial was not all inclusive. No TPLF member was held accountable in these trials; and No EPRP member that I know has been held accountable in these trials.* Without doubt, of course, the

⁸⁰⁰ Anonymous R1, Above n 745

⁸⁰¹ Anonymous R11, Above n 712; The response of R39, Above n 725, who rejected the prosecution process, is not presented here because it is not much needed.

⁸⁰² Anonymous R11, Above n 712. He commented that "there is that talk that the so-called white terrorists were really not held accountable; it is only what they called the red terrorists. Those who were opposed to the Dergue were [not] prosecuted, and who committed crimes against the Dergue were overlooked. There is that talk in/among the society. Personally, I am not aware of any large-scale murder as there were in the Dergue within the opposition parties. Yes there were people who killed occasional Dergue cadres allegedly in self-defence. But, personally, I do not know of anybody that committed large scale killings against the Dergue or their supporters"

⁸⁰³ This seems to accept the argument that the emphasis on the Dergue was correct.

killings was largely attributable to the Dergue, but occasional killings were definitely inevitable by other forces.... they really have not been held accountable for their crimes.⁸⁰⁴

Although not comparable to what the Dergue did, other political groups had a part in past violence but they were not held accountable; and that makes the process not inclusive. The process was also described as not inclusive from another angle, i.e, its failure to bring some Dergue members, including their leaders, to justice:

The trial was really half hearted in that it was not going after the real criminals like Mengistu HaileMariam. There was not really on our efforts to have Mengistu HaileMariam extradited to Ethiopia or prosecuted wherever he was. And there were some horrific cases committed by Ethiopians who are residing very comfortably abroad. So, the trial was not all-inclusive, it was a hotchpotch business. It was not really given the seriousness it deserved.⁸⁰⁵

Here, the issue of non-inclusiveness extends even to Dergue members. However, it can be argued that as far as Dergue members are concerned, the framework did not exclude anyone, and the above comment only relates to the actual implementation of the prosecutorial framework. Again, it is useful to note that some residents of both Mekelle and Addis Ababa characterize the process as partial for its exclusion of other political parties from responsibility.⁸⁰⁶

To sum up the views of this category of respondents, the data suggests that the prosecution framework as adopted was not appropriate because of its exclusion of other political groups that might have committed crimes in the past. It is also interesting to note that some of these respondents had already rejected prosecution as a modality of transitional justice, preferring truth and reconciliation instead as the appropriate mode of addressing the past. However, also present are respondents that supported either prosecution or a combination of modalities, with inclination perhaps to reconciliation, as proper solution to Ethiopian context. Irrespective of

⁸⁰⁴ Anonymous R11, Above n 712

⁸⁰⁵ Anonymous R11, Above n 712

⁸⁰⁶ Anonymous R24, Above n 740; Anonymous R20, Above n 762; Anonymous R15, Above n 743. In addition, R 18, who supported prosecution noted, “i do not know the framework, but if it excludes other criminals it is unjust”.

these differences, they are of the opinion that processes of accountability should be impartial, and hence describe the Ethiopian process as partial and unacceptable. We might also note that there are differences of opinion among the group on the extent of violations committed by other political groups. Nevertheless, they are united in the characterization of the prosecution framework as victor's justice. These views in the third category generally also reject the argument of the second category that argues that the emphasis on state violators was correct.

At this juncture, it is necessary to highlight the important points on the issue of inclusiveness. Although the first category of respondents, former SPOs, assert that the framework was all-inclusive to allow prosecution of all perpetrators irrespective of their affiliation, the law contradicts this view as Article 6 of the SPO proclamation gives jurisdiction explicitly only on violations committed by the Dergue or its affiliates. It is not clear on what basis or authority these respondents derived the mandate to investigate crimes committed by other groups.⁸⁰⁷ However, interestingly this group also recognizes that other political groups were involved in the violations of the past, and hence that there was a need to investigate and prosecute.

The proponents of the prosecution process argue that the framework was proper in focusing on the violations of the Dergue because the Dergue was a state perpetrator requiring special emphasis. The latter part of the argument may remain uncontested. To a certain extent, the data conforms to the official narration of the history of violation discussed in the second chapter; and thus the framework cannot be challenged for addressing such violations. Nevertheless, the question of the roles of other political groups in past violations remains. We can clearly see from the data that other political groups also committed crimes in the past. This again affirms that there is another aspect of the history of violation, which is not reflected in the official narration as discussed in the latter part of chapter two. Thus, the framework for prosecution may be contested for failing to include these other histories of violation; the question of the implication of this exclusion on effective transition also remains.

By way of summary, this section investigated the appropriateness of the Ethiopian transitional justice framework by focusing on (a) the appropriateness of criminal prosecution,

⁸⁰⁷ Although this researcher has asked them, they stated the proclamation did not prevent them from investigating crimes committed by other political groups.

(b) the existence of public participation, and (c) the question of inclusiveness. Each of these issues are subject to contestation, which might have implications on the appropriateness and outcome of the transitional framework as well as whether there has been successful transition. Proponents of prosecution base their support for prosecution process on the need to establish the rule of law, give lesson to the public, and deterrence. Whether these objectives were achieved will be considered in the next chapter. The rejection of truth and reconciliation primarily relates to the absence of the conditions for truth and reconciliation in the sense that the former regime was totally defeated, posed no threat to the future, and had no bargaining power. However, this view of associating truth and reconciliation process to negotiated transitions apparently neglects the significance of such process to other transitions including Ethiopia, discussed in chapter 4. One may also support the Ethiopian framework based on the duty under international law to prosecute grave violations of human rights, however contested this might be.

We can also clearly note the views that rejected the prosecution process arguing that prosecution or prosecution alone was a proper mechanism of dealing with the past, and rather preferred truth and reconciliation. The rejection of prosecution was partly based on the argument that the whole process was motivated by punishment and vindictiveness, partiality, and the absence of other desirable outcomes. In addition, there are indications that prosecution cannot address the culture of political violence that is deep rooted in the country. Moreover, even respondents who endorsed prosecution have also admitted limitations in the process in the sense that it was difficult or impossible to go after each perpetrator. It is clear that in the face of the extent of violations committed, prosecution could not cover all perpetrators. This demonstrates the impossibility or undesirability of wholesale prosecution, and the need for other complementary processes. It is also clear from the legal framework that reparation and reconciliation was not part of the transitional process. The absence of any reconciliation process might mean the perpetuation of social and political divisions and conflicts, which prevent successful transition. The criticism against prosecution becomes even stronger when we look at the other issues as well.

Another issue relates to the existence or otherwise of public discussion and participation in the formulation of the framework. The theoretical discussion considers issues of transitional justice are public issues. The society has to deliberate and decide on how to address its violent past. The most comprehensive options should be sought and a careful choice has to be

made. The society has to decide what is best for it. This is crucial for a successful transition. In this respect, all the respondents stated that the government formulated the framework, and none of them claimed the existence of public participation on the issue of how to deal with the past. Rather three respondents stated the government had exclusively adopted the framework without any public discussion and participation. The government at the time was the Transitional Government of Ethiopia (TGE). That government was not composed of people's representatives; rather it was composed of representatives of political parties, with EPRDF having the majority seats. The exception to the lack of public participation is the limited discussion with victims or their families. However this is in itself subject to criticism; but it is not about why the government consulted victims. There is no doubt victims should be part of the process. The problem is that this consultation was very limited and not all-inclusive.

Apart from this exception, the data shows the lack of public participation, either directly or through their representatives, as there was no representation at the time. On the other hand, there are indications of the influence of the international community in the formulation of the framework. This may give rise to the question about the extent to which the international community dictates transitional frameworks. Are not questions of transition mainly one of domestic in nature, over which the society has primary interest? Why should the international community adopt different standards in different countries?

The other important point worth noting relates to the narration of history of violence, and more specifically to the definition of perpetrators/crimes to be subjected to transitional justice processes. As discussed in chapter 3 and 4, the proper framing of the scope of the transitional justice process is essential for a society to deal with its past. The society should properly define the crimes, perpetrators and victims. In this respect, the Ethiopian framework provides that the Dergue and its affiliates committed violations or crimes. It is clear from this that the victims are those victims of the Dergue. Hence, the criminal prosecution focused on members of the Dergue that committed crimes. The question however is whether such a formulation of crime, perpetrators, and victims is appropriate in the context of the Ethiopian transition.

The available data shows that the Dergue committed grave crimes unprecedented in Ethiopian history. It committed systematic violations by using state apparatus and public

resources. None of the data questioned that. However, problems arise when the question is asked whether the Dergue was the only violator.

Most respondents admitted that other political groups had also committed crimes in the past. However, there are arguments that the exclusion of these groups from the framework was proper because their participation was limited, and incomparable with that of the Dergue. According to this view, the emphasis was on state sponsored violations and thus proper. However, there is evidence that other political groups, especially, the EPRP, were equally responsible for violations. We might highlight two points here. First, it is acknowledged that other political groups committed crimes in the past. None of the respondents said other political groups were free of crimes. Second, the contentions relate to the extent, and the systemic nature, of the crimes. It is true that they never used the state machinery. Nonetheless, they committed crimes irrespective of the degree of the crimes and irrespective of the punishment due. In addition to the data provided, substantial literature also indicated that other political groups committed crimes during the Dergue regime.

In light of all these accounts, the transitional framework can be questioned for its narrowness in the sense that it did not address violations committed by other political groups. If the disagreement is on the extent of violations, would not it be appropriate to investigate and establish the truth than just dismissing it as very limited? How can one justify this selectiveness to victims of crimes committed by other political groups? Is their suffering less important to society? Should not the society care for all its victims? If we seek justice and truth about the past, should not the framework be all-inclusive in terms of defining crimes, perpetrators, and victims? Would a society be satisfied with partial justice and partial truth? What are the implications of this problem of the framework on the search for justice, truth, and the future of the society?⁸⁰⁸ This author thinks that a proper response to the past should be based on the recognition of all violations and sufferings without consideration of the political affiliation of violators or victims. Society should care for all of its victims and deal with all violators, although this does not necessarily mean bringing all violators to the same process of accountability. This is essential not only in terms of rectifying past wrongs but also in terms of building an inclusive better future.

⁸⁰⁸ These questions are addressed in detail in the coming sub-section (on justice) and chapter six (on truth and other contributions of the process as a whole)

Generally, the Ethiopian framework of dealing with the past is problematic from the following perspectives. First, the choice of prosecution as a solution to Ethiopia's past and implications for the future can seriously be questioned in view of the strong criticism and alternatives forwarded. Secondly, the framework was adopted by the State or government with limited consultation with victims and perhaps under the influence of the international community. The absence of broader public participation in the formulation of the process poses questions on its appropriateness, legitimacy, and its ability to achieve desirable goals including justice, truth and reconciliation. Thirdly, the framework excludes violations committed by other political groups, and lacks the comprehensiveness it requires in dealing with the past. It does not recognize the suffering of victims of crimes committed by such groups, and exonerates the latter of any accountability. This in turn may compromise the search for justice, truth and other desirable goals.

5.3 Justice - Was Justice Done?

This section questions whether justice was achieved at the end of the prosecution process. It should be pointed out some of the Dergue convicts were recently released from prison. One would like to see the implication of this release for transitional justice process. However, this study focuses on the general issue whether justice was done.⁸⁰⁹ Thus, respondents were asked their opinion on whether the prosecution process has accomplished its task of rendering justice. Interestingly, the responses show a significant difference ranging from one stating justice was done to another that nothing was achieved, each providing their respective reasons. These responses were closely examined and categorized into two categories – those that claim justice was done and those that claim the process has not resulted in justice. Exemplary views of both are presented and analyzed below.

Category one: Justice was done

⁸⁰⁹ This author has tried to analyze the issue of release and its implications for the transitional justice process. The release of prisoners was subject to contestations from two related perspectives. The first relates to the legality or constitutionality of the release, while the second concerns the implication of release on the outcome of the transitional justice process – how it affects justice or lack of it. A general consideration of the responses indicate that there are diverse views highlighting the problems involved in the process of release as well as implications for the transitional justice process. However, to save time and space, the issues relating to the release of prisoners are deliberately excluded from this study.

In this category, we find respondents who claim that justice was done through the prosecution and judicial process. However, they also express certain limitations or reservations based on some procedural and technical problems.

An interesting start is to look at victims's perspective. Thus, a family member of a victim expressed the following view:

My present feeling is different from that I had twenty or so years ago. At that time, I wanted them killed. I do not feel like that now. I feel satisfied because all convicts have received the punishment due. They suffered in prison for 20 years. I think that is enough. I think it is better to leave the rest to God.⁸¹⁰

This clearly underlines retributive justice, and a victims' family feels satisfied although the reservations are apparent from the assignment given to God as the ultimate punisher. Moreover, the delay in the proceedings is cited as a major problem in satisfying the need for justice from the families' perspective.⁸¹¹

A former Special Public Prosecutor, has the following to say:

I believe it [the process] has rendered justice in accordance with the law. What does it mean? The investigation was successful; investigations regarding the alleged crimes were completed and then evidence were submitted by the SPO to the court and the accused as well; the accused has retained a lawyer or a lawyer was assigned for him to defend himself; and then the court has passed decisions after weighing the evidences. From this perspective, I would think justice was rendered.⁸¹²

A significant issue during transition, as discussed in chapter 4, is the conception of, and mechanism for achieving, justice. The above view stresses that justice relates to the investigation, prosecution and conviction of wrongdoers in accordance with the requirements of due process of law; accordingly, justice was regarded as being done in the Ethiopian transition. Nevertheless, this assertion is followed with doubts and uncertainties of the SPO

⁸¹⁰ Anonymous R8, Above n 704

⁸¹¹ Anonymous R8, Above n 704. She noted that "I would have been satisfied and happier if the perpetrators were found guilty and punished immediately".

⁸¹² Anonymous R3, Above n 682

that question the adequacy of the process in rendering justice.⁸¹³ This problem becomes further evident from the following reflections of a former Special Public Prosecutor:

...there could be, even among those brought to justice, people who escaped justice because their case was not properly considered, and hence no decision was passed against them. So, in that respect there could be lack of quality in practice. This may have resulted from the huge number of cases accumulated over time and the like. But generally justice is done. But, there could also be a problem whether all actors, all crimes were addressed. But in general, justice, in accordance with the law, is done.⁸¹⁴

This again suggests the challenges in achieving justice. It was not possible for the reasons stated above to prosecute, convict and punish all persons that might have committed crimes.

A senior government official put his view about the outcome of the process in terms of justice as follows:

It is very difficult to answer. It makes you subjective in a sense. The Derg regime was criminal. The leaders of the regime were brought to justice. This shows justice was done.⁸¹⁵

Although this view appreciates the problematic nature of the concept of justice, it resolves in favour of criminal justice, which arguably was achieved in Ethiopian transition. However, the respondent, in his earlier remarks relating to the framework, acknowledges what appears to be the impossibility of prosecuting all wrongdoers, and argues selective prosecution was justified.⁸¹⁶ However, we should note that the legal framework authorizes the investigation

⁸¹³ Anonymous R3, Above n 682. He noted “But the term justice is a relative one; procedural and substantive justice is secured. But, for people who question its quality, it may be controversial. Did the violators really received punishment that suits what they did? Was the evidence properly evaluated and proper decisions made? Were violations of law properly detected and rectifying measures taken? I really very much doubt. But, technically, I think justice is delivered.”

⁸¹⁴ Anonymous R3, Above n 682. He aired this opinion regarding the possibility for some to have escaped prosecution.

⁸¹⁵ Anonymous R4, Above n 689

⁸¹⁶ Anonymous R4, Above n 689. He noted that “but one cannot say it [the prosecution and judicial process] gave solutions to all. There is a time factor; the violations were committed over 17 years; a generation has passed; as time passes, evidence is lost; people die-all these factors create gaps. So, on the one hand you have no choice except legally condemning the system and bringing the top leaders to justice. But you cannot proceed

and prosecution of all Dergue members that might have committed crimes, and hence the respondent's view (selecting and prosecuting the top leaders) has no legal basis.

Nevertheless, the above view highlights the problem associated with prosecution when many people were involved in past violence, as discussed in chapter four. We recall Erin Mobbek's observations on the inadequacy of local judicial systems to deal with all perpetrators, the undesirability of wholesale prosecution, and the perception of arbitrariness or unfairness in case of limited prosecution.⁸¹⁷ Hence, the recommended solution is to have a combination of methods of transitional justice. The problem with the Ethiopian process of prosecution, in light of the above response, can therefore be the unavailability of complimentary methods to deal with perpetrators. Again, it should be noted that the legal framework authorizes the investigation and prosecution of all Dergue members that might have committed crimes, and hence the above view about the correctness of selecting and prosecuting the top leaders has no legal basis.

A Federal Supreme Court judge, who believes justice was done, questions whether victims and the public equally have such a perception:

Justice has been rendered through the judicial process. But, it is also appropriate to ask whether there is that feeling. Utility theory does not justify criminal justice. These perpetrators were brought to courts and received judgement. This can be considered as justice. But from the perspective of victims and society, do they think justice was done; was any lesson derived; these are questionable. The case took 10-20 years, which delay itself had created hopelessness....; in between people forget the judicial process. If the case was completed within 5 or 6 years, it could have achieved better.⁸¹⁸

This is recognition that, apart from the judicial process and its results, public perception about the process is important. Interestingly, the delay in the judicial proceedings was one problem compromising public perception about the process and its results.

with all acts and all people; if you want to do that all other works are to be ignored; you dedicate your life to chasing and capturing suspects in each locality and district. So, the objective was let's condemn the system and at the same time bring top leaders to justice. It is impossible to go after each case during the Dergue."

⁸¹⁷MOBBEK,E, Above n 315 at 277-278.

⁸¹⁸Anonymous R31, Above n 713. He also suggested the process was fair from the perspective of the accused that they were treated humanely and fairly through out the process.

Asked whether justice was done, another respondent opined as follows;

Well, I do not know. Justice is often measured in many ways, not only from victim's perspective but it is measured by the whole process. There exist unavoidable procedural requirements. We have hearings before independent courts. The procedures for the introduction of evidence [were] complied with. Looking at justice process from these perspectives, a lot may be said. The process took quite a long time and as a result posed challenges over presenting witnesses, though there was no problem of documentary evidence. Some witnesses may have died in the process, some may have left the country and some may have changed their minds. All these may eventually have an impact on the entire process.⁸¹⁹

Justice is seen as the rendering of judgement in accordance with the requirements of due process. This may fit with legal justice as discussed in chapter four. Nevertheless, it is clear that certain factors have limited this process of rendering justice. Again, the success of the process in rendering justice relates to the prosecution and conviction of top leaders, although there are uncertainties even in that respect:

But then again, it was also possible to see that those who were at the top of the regime, who allegedly committed the crimes, were brought to justice and were found guilty as charged in a fair trial. This for me depicts the real picture. The question of how many of these had been convicted and how many of them have been found guilty, I suppose requires looking at every specific detail.⁸²⁰

The proponents of the process also see the failure to carry out punishment as another limitation in achieving justice.

⁸¹⁹ Anonymous R2, Above n 697. He provided in detail the procedural requirement and also what he thought might have affected the eventual output. He cited the procedural requirements including impartial and independent judiciary, procedure relating to introduction of evidence, presumption of innocence and the like. He also opined on the limitation of capacity of the judiciary and the economy of the country; and that the country has done what it can; so within the context and limitations, the view is that there is some success in terms of achieving justice.

⁸²⁰ Anonymous R2, Above n 697. He commented not everybody accused was found guilty, and that the fact that not every accused was found guilty is an indication of justice. Accusation does not lead to a guilty verdict-evidence should be presented. However, one may question why evidence was not presented.

There are convicts on the record that the government has failed to apprehend and execute punishments. This is one limitation on justice. Mengistu Haile-Mariam is a convict on the record. Justice is not only to pass decisions on the record; justice is done if each individual must receive the punishment due according to the decision. Some had also died of course. In fact, some had received punishment. There were also people in respect of whom evidence was not found; or even if evidence existed but the case never came to close for different reasons. So, these factors should be seen in detail. It may be difficult to look at all things, but they have proved something. In fact, the existence of human rights violations during the Dergue was established through the judicial process. I think that is a very important point.⁸²¹

Apart from the concluding remarks about the success of the process, the above statements also show the complex problems involved in limiting the outcomes of the judicial process.

It might be important to note the perspective of another victim's family member on the issue of justice. A victim's brother noted, "it is possible to say justice was done."⁸²² This is further explained as follows:

That is because of the procedure. You cannot change anything by killing people. One should emphasis on education not revenge. I have nothing to object. In a civilized nation, one who kills will not be killed; he may be sentenced to life imprisonment.⁸²³

For this respondent, prosecution has served the interest of justice, and justice is not revenge but educating the people. Commenting on whether justice was done regarding perpetrators involved in the murder of his brother, he stated that:

Some of them were already dead. The Dergue killed the person who used to investigate my brother. There is a saying a revolution devours its children. Some of them were arrested, and some of them escaped. One of those I complained against left the country through Sudan. I hear he lives in America. Many of them were arrested.

⁸²¹ Anonymous R2, Above n 697. He also argued the process has set a precedent that those on power cannot go free if they do wrong.

⁸²² Anonymous R38, Above n 691

⁸²³ Anonymous R38, Above n 691

Others remain at large. Some others already died. One went to Eritrea but died later. One of them was convicted and was serving prison sentence but latter released.⁸²⁴

Despite the escape of some perpetrators from justice, this relative of a victim feels satisfied with the prosecution process and had no objection at all. Those who have escaped might receive God's punishment. This is similar with the opinion of the first respondent, a family member of a victim.

Again, it is worth mentioning that some residents in Addis Ababa and Mekelle as well as a former SPO and a former Dergue Cadre generally agree with the view that justice has been done with respect to the crimes committed by the Dergue.⁸²⁵

The final view worth presentation here sees justice as having different levels, and the process might be considered as satisfying certain aspects of justice while failing to do so in other respects. This is clear from the following:

Well, justice has different levels. These people were in government power...and the fact that they were brought to courts and were questioned for what they did may be considered as one satisfaction. However, appearing before court is one step. To appear and receive proportional punishment is the second step.⁸²⁶

The formal process of accountability might be considered as an aspect of justice. Nevertheless, justice also requires that punishment be proportional with the crime committed (deontological perspective of retributive justice), and it must be carried out. This second aspect appears problematic as one respondent noted.⁸²⁷ The imposition and execution of

⁸²⁴ Anonymous R38, Above n 691. He stated that the convict was released because he is HIV victim. He also stated that he has no anger against the perpetrator during occasional encounters because according to him the person was released because he himself is a victim of HIV, and that is God's punishment.

⁸²⁵ Interview with Anonymous respondents R18, R13, R33, R32, R17 exemplify the view of respondents. In addition, a former SPO, Anonymous R6, Above n 686, noted that "justice was punishment and punishment on perpetrators was 100% achieved". In addition, Anonymous R9, Above n 707, briefly stated that "justice was served".

⁸²⁶ Anonymous R10, Above n 713

⁸²⁷ Anonymous R10, Above n 713. This respondent noted, "I have my doubts on whether they [perpetrators] received proportional punishment. First, due to the delay of the process, witnesses were fed up and failed to show up; even people who know the cases say I do not wish to testify. Torture survivors refused to testify on the ground of avoiding a feeling of embarrassment that may result from publicly telling of what they went through. And because of all of these some people who committed crimes didn't receive proportional punishment due to lack of evidence. Second, even where the evidence proved the crimes committed, the judges did not pass

proportional punishment is hindered because of lack of evidence associated mainly with delay, leniency on the part of judges, and inability to enforce court judgement (failure to apprehend or to get extradition). These factors have significantly hindered the satisfaction of the need for justice.

To conclude, the above views highlight that justice was done. According to this view, justice relates to the investigation, conviction and punishment of perpetrators according to the law. However, as already discussed in chapter 4, this notion of punitive justice is subject to criticism. In addition, the scope of the prosecution process must have prevented the full criminalization of all past wrongs. Nevertheless, we should note that the above views also acknowledge crucial deficiencies – including procedural and technical problems - that clearly limited the outcome of the judicial process, including justice. The argument is that justice was done but it was not complete. They admitted the shortcomings to a certain extent although some might have expressed their dissatisfaction more strongly.

One problem that was commonly cited is the issue of delay and the resulting gap in producing evidence, particularly that of testimonies because witnesses had died, either left the country or simply opted not to testify for different reasons. Thus, some perpetrators might have gone free for lack of evidence and the implication of this on justice is clear.

The other point is the indication that even those brought and convicted had not received proportional punishment. Some perpetrators might have not been brought to court; thus, there is a failure to bring those living abroad to justice. Although some principal perpetrators were tried and convicted in absentia, they were never punished, mainly because of inability to apprehend and execute punishment.

Clearly, we can understand the difficulty or even impossibility of prosecuting all perpetrators and all crimes of the Dergue. The implication is that although the framework allows and even calls for the prosecution of Dergue member or affiliates, there are practical difficulties in doing so; and according to a senior government official that this is even impossible to

proportional punishment because the judges, looking from the time they passed judgment, considered the remoteness of the time of commission of the crimes. Thirdly, some of the main actors in the violations had left the country at the time of the transition and the government's attempt to bring them to justice was unsuccessful, and these people still lead a comfortable life in the West and some other countries. Some were convicted in absentia but it has not touched them. From these perspectives, one wouldn't confidently say justice was rendered or served."

achieve. The other problem worth noting was the incapacity of prosecutors and courts, and the limited capacity of the country's economy. Clearly, these institutions did not have the human and other resources and experience to deal with such huge and complex cases. A consideration of all these problems gives rise to the question whether the Ethiopian transitional justice process has satisfied the need for justice, and contributed to successful transition. In light of all these limitations, it might be difficult to say justice was done or done satisfactorily.

Second Category: No justice was done

Respondents in this category state that no justice was obtained from the prosecution and judicial process. One line of argument is that the conception of justice in Ethiopian societies is different from that adopted by the transition, and therefore justice was not done. The following view, on whether justice was done, demonstrate this point:

No, actually not. The victims will not feel vindicated unless there is reconciliation effort made; unless for example, he [the perpetrator] confesses or asks for forgiveness from the victims or their families. You know Ethiopian society is still a traditional society especially in the rural areas; convictions do not mean anything really. It does not mean much. What is really important especially in the rural areas is the fact that the person prostrates himself in front of family of victim and asks for forgiveness. That is the most important thing. The conviction does not mean any thing.⁸²⁸

Clearly, acknowledgment, forgiveness and reconciliation, between or among perpetrators, victims and their respective families, are understood as essential elements of justice in Ethiopia, more than conviction before courts. These non-formal processes might arguably encompass the notions of restorative justice. Hence, the main problem lies with the conception of justice and the transitional mechanism of dealing with the past in the sense that prosecution and conviction is not seen as the proper way to do justice in the Ethiopian context.

⁸²⁸ Anonymous R11, Above n 712

A respondents underlines the delay of the proceedings, a point raised by respondents in the first category, as another ground to claim justice was not served.⁸²⁹ As indicated earlier, the SPO had also the mandate to establish and record the truth, and this mandate was presented as a cause for the delay. While it could be argued that the institutional inadequacy of the justice organs is the central cause, the implications of the delay on the outcome (justice) are clear. Nevertheless, it is interesting to note the appraisal of the trial process as fair.⁸³⁰ Clearly, this view on the fairness of the trial process corresponds with the views of respondents in the first category.⁸³¹ One might say the elements of legal justice are fulfilled, and hence the process is acceptable, at least, in a formal sense.

A more critical view holds that a partial justice is no justice at all.⁸³² Thus, one cannot be partial and just at the same time. As discussed in chapter 4, this is a point that opponents of prosecution cite as a problem of prosecution. Such a perception has led some to dismiss the process as a whole, as observed in the following terms:

I really did not follow that [the prosecution process] with interest because ...of the reasons that I said earlier, I lost interest in the whole thing, to the propaganda, and so eventually, gradually and even now you see clearly that the Woyane have no regard for justice, they do not care for justice in the real sense.... So, it was a propaganda, they used it for propaganda and for this reason...there is evidence that there were many western governments that sent the so called experts in this process and many of them were disenchanted and went back in two or three months. They did not like it. I

⁸²⁹ Anonymous R11, Above n 712. The respondent noted, “this [delay] is something that I have actually written about in the local papers. There was unnecessary delay. Too much delay and too many witnesses and justice delayed is justice denied. That is really what happened in the Ethiopian case. The problem was with the proclamation actually. The Proclamation not only set up prosecution but it also mandated the prosecutor to keep record of what happened during the red terror. So, one of the functions of the trial was to keep official record of what happened. And I think these clashes with justice. And, I think the purpose of justice is really to try the perpetrators as soon, as quickly, as possible and reach at a decision. So, the prosecution was really burdened with extra-judicial functions such as recording what happened during the red terror. I think the recording should have been done under another condition rather than mixing it with prosecution.”

⁸³⁰ Anonymous R11, Above n 712. This point is made clear in the following terms: “The trial from what I observed, I have been observing at the time, I believe it was pretty fair. The defendants were given really top-notch lawyers in the country, they were given adequate time to prepare their defence, and they could call any evidence or witnesses that would support their cases. So, on the whole, the process of the trial, I would say, was quite fair, and it was within the limits of what I would call fair trial”

⁸³¹ Anonymous 2, Above n 697

⁸³² Anonymous R1, Above n 745. As already quoted, this respondent notes that “No...No...That was why right from the beginning I was crying for...so, you cannot [say justice was done]. We call EPRP kills people, Maison Kills people, andwhen you say Maison kills, that is a crime; EPRP kills, that is okay, then you have created no standard for the society as a whole. So, it is basically a continuation of the same thing with the actors perhaps changing.”

think it was propaganda and not [justice]. But, I think they profited, they got a lot of money from various governments and organizations.⁸³³

In light of the motivations of justice discussed in chapter 4, the above view indicates that the whole process was not motivated by reason or the desire to see justice done; rather it was driven by self-interest of the incoming government. However, the agent presents itself as acting based on reason or the desire to do justice, although that is not the real motivation. This point is further noted as follows:

...they [the 'Woyane'] were declaring that they were rectifying wrongs that were committed in society and [doing] justice. But the fact is as I told you when they left a group of people who had killed and when in fact when the group of people that killed become part and parcel of the EPRDF regime, and when those others, the Ma'son, who were against them became villains alone.... the whole thing had vitiated right from the beginning. You cannot expect justice from that process.⁸³⁴

The partiality of the process is questionable and lead to the conclusion that what the government declares is mere rhetoric rather than the real motivation. If there is real commitment to justice, all past violators should have been held accountable. The determination of who a criminal is or what the truth is depends on the will of the government and not on the facts. Such a partial process can serve neither justice nor truth.

It is also interesting to note the perspective of victims on the question of whether justice was done. A victim of the Dergue and a former Minister rejected the process as a whole; when asked whether he himself, as a victim, felt satisfied with the outcome (justice), he opined that:

I think...as I said earlier, political killings in this country precede the Derg. The solution is a political solution. We have to change our political culture. As I said, very few people were imprisoned/received judgement. The majority were not even

⁸³³ Anonymous R1, Above n 745

⁸³⁴ Anonymous R1, *ibid*

questioned...You cannot try the system by imprisoning and chasing few people; the procedure was different - that is pardon; we have to forgive each other.⁸³⁵

This is a reaffirmation of the rejection of prosecution as a solution, and his stated preference for other process – reconciliation process. The dissatisfaction with the process and outcome is clear:

...The whole process was objectiveless....the line is mixed. You cannot distinguish the innocent and the perpetrators. They are mixed... It was thus a useless process; and now we need dialogue and forgiveness among and for each other.⁸³⁶

This view reflects that justice was not served because it lacks this objectiveness - it failed to properly identify victims and perpetrators and hence it was useless. Thus, it calls for other alternatives for dealing with the past. The above view demonstrates that some victims of the red terror do not think justice was done, and the consequent dissatisfaction questions whether effective transition is possible at all.

A resident in Mekelle who questioned the motivation of the government's actions, presents a similar view.⁸³⁷ Other residents both in Mekelle and Addis Ababa observed that justice was not done for various reasons including the lack of government's commitment, the lack of evidence, partiality of proceedings, weakness of justice institutions etc.⁸³⁸ In addition, a former judge is of a similar opinion.⁸³⁹

To sum up, respondents in this category do not believe justice was done. One point worth noting is that the Ethiopian transitional justice process did not incorporate or reflect the conception of justice of Ethiopian societies, and hence no justice can be expected from the process. The elements of truth and reconciliation such as acknowledgement and forgiveness are more important to Ethiopian society (traditional) rather than punitive justice that was associated, as discussed in chapter 4, with a westernized conception of justice. Hence, the

⁸³⁵ Anonymous R39, Above n 725. He commented "may be only 0.1% the perpetrators were brought to court", with an implication on the outcome of the process. He also talked about the lack of evidence for the problem.

⁸³⁶ Anonymous R39, Above n 725

⁸³⁷ Anonymous R24, Above n 740

⁸³⁸ Anonymous R12, Above n 762; Anonymous R15, Above n743. Anonymous R14, who supported prosecution, however commented the process was not satisfactory to the victims or families.

⁸³⁹ Anonymous R20, Above n 755

prosecution process was considered as a failure in terms of rendering justice. Two other reasons are also offered as to why there was no justice. The first is the lack of true will on the part of the government to secure justice, and the second and related one is the partiality of the prosecution process. We should also note some problems associated with the actual prosecution and judicial process – such as delay – that have their own implications on whether justice was done. These contestations seriously question whether the Ethiopian society has properly addressed past crimes and thereby established a new social and political system that significantly departs from the past.

To sum up this section, I will highlight certain points. We clearly see diverse views on whether the Ethiopian transitional justice process has rendered justice. These views suggest several problems that have implications for the transitional justice process. It is true that the supporters of prosecution believe justice was done because the perpetrators were investigated, prosecuted, convicted, and punished in accordance with the law. Hence, that is what justice is. However, they also recognize the procedural and technical limitations that have compromised the search for justice. The main problem, which led to other problems, was delay. Obviously, the data shows that the delay has negatively affected the production of evidence because as time goes some witnesses have died, left the country and changed their mind. As a result, some perpetrators went free for lack of evidence. The delay also affected the right to speedy trial with an implication that justice delayed is justice denied.

The other problem was the absence of proportionality of punishment, in the sense that some perpetrators received lenient punishment. In addition, there was failure or inability to apprehend or extradite some offenders who live abroad, and bring them to justice. Moreover, there was failure or inability to execute punishment pronounced by courts in relation to those tried in absentia. The point is mere declaration of conviction and punishment on judicial record is not enough. Considering the magnitude of violations committed, it was difficult or even impossible to prosecute all Dergue members. In addition, there were limitations in institutional capacity and economy of the country. However, all these limitations to justice were raised in relation to violations committed by members of Dergue. Nevertheless, they all show the search for justice was not complete, which arguably limits the effectiveness of the transitional process.

The other and most drastic view is that justice was not done at all for different reasons. The first problem was the lack of confidence in the entire justice and political system. It might be argued that the government had never been driven by the desire for justice or truth; and even had subjected all institutions to its service. Hence, nothing would be expected from the prosecution and judicial process. The second problem lays in the conception of justice and choice of the modality itself in the sense that truth and reconciliation would have better redressed victims and created harmony within the society; and that reconciliation is part of traditional dispute resolution in Ethiopia. Conviction and punishment alone does not mean anything. Appearing before victims/families and asking forgiveness is considered as the best justice and compatible with tradition. However, one may ask how formal systems and informal systems can interact. Would customary/traditional resolution have been possible in light of the mandatory international laws that oblige prosecution? The third problem relates to the partiality of the legal framework itself, and that justice cannot be partial. It is clear that the framework mandate the SPO to investigate and prosecute members of the Derg that committed crimes, and never talk about the violations committed by other political groups. Two former SPOs opined that they actually investigated crimes irrespective of who committed it, and this could be supported. However, there are two problems here. First, the legal framework does not allow them to do so, and clearly their actions lacks legal basis. Secondly, there is no indication that these were the case in other proceedings. However, it shows the importance of dealing with all crimes irrespective of who committed them. Nevertheless, the framework has failed to authorize such proceedings making it partial, and inconsistent with the need to do justice. Generally, the above problems suggest the search for justice and the need to build a better future founded on justice remain unfulfilled.

Concluding Remarks

This chapter investigated whether the Ethiopian transitional justice framework provided a proper mechanism of dealing with the past as well as whether it has rendered justice. This involved a critical examination of the legal framework and the presentation and analysis of data. A closer examination of the legal framework clearly shows that Ethiopia adopted criminal prosecution as a modality of dealing with the past and a certain conception of justice was incorporated as its objective. The analysis of data, regarding the appropriateness of the framework as well as whether justice was done, demonstrates the problematic nature of the Ethiopian transitional justice process. First, considering the legacy of violation, and the long

accumulated ethnic, social and political divisions and conflicts within Ethiopia, the framework's emphasis on punishment and its exclusion of truth and reconciliation processes can be questionable. Secondly, again considering the narrations of history of violation in Ethiopia, the transitions adoption of a particular narration and exclusion of other narrations is problematic. This is has led to selective prosecution, and gave rise to partiality and one-sidedness. Thirdly, we can understand the absence of broader public participation in the formulation of the transitional framework, which questions both the effectiveness and the legitimacy of the process. These problems of the framework had implications the outcome of the process, including whether justice was done. As considered above, the prosecution process was so problematic that it might not be possible to say justice was satisfactorily done. Thus, whether the Ethiopian transitional justice has settled the past and served as a foundation for a better future is questionable.

CHAPTER SIX: INTERROGATING TRUTH AND OTHER CONTRIBUTIONS

6.1 Introduction

This chapter addresses whether the prosecution and judicial process had established the truth and investigates whether it has made other contributions to the society as a whole. The first section interrogates truth in the Ethiopian transition by analyzing the legal framework and the available data. The second section questions whether the process had other contributions apart from, or in addition to, rendering justice and establishing the truth. The aim is to gain a view on the overall contribution of the process, if any.

6.2 Interrogating Truth in the Ethiopian Transition

Truth, we have understood, is a crucial component transitional justice process, as knowing the truth about the past has implications for a society's future. Despite its contested meanings, there remains a need to search for and record the truth about the past, and make the public aware of such truth. This section interrogates whether the Ethiopian transitional process of accountability had addressed the issue of truth. To achieve its objective, this section contains three sub-sections. The first outlines the place of truth in the Ethiopian transitional framework. The second sub-section deals with the issue whether the truth is actually established based on available data. Finally, the third sub-section provides concluding remarks.

6.2.1 The Place of Truth in the Ethiopian Transition

To identify the place of truth in the Ethiopian transition, it is necessary to look at the proclamation establishing the Special Prosecutions Office, as discussed in detail in the preceding chapter. The most relevant part is the preamble, which provides that:

...Whereas, it is in the interest of a just historical obligation to record for posterity the brutal offences...perpetrated against the people of Ethiopia and to educate the people and make them aware of these offenses in order to prevent the recurrence of such a system of government.⁸⁴⁰

No other part of the proclamation specifically talks about truth. Therefore, it is necessary to analyze the different aspects. The preamble talks of what Ruti Tietel termed ‘historical justice’.⁸⁴¹ The proclamation defines the offenses that are subject to recording. Moreover, the recording of the brutal offenses of the past is a matter of just historical obligation rather than preference. The formulation in terms of obligation, although not legal, may lead to the conclusion that there must be a right holder. As discussed in chapter 4, this right to truth may belong to victims and relatives or the society as a whole. Victims and relatives need to know both the identity of the perpetrators as well as the motives behind the crimes committed. People want to know the fate of disappeared family members or relatives. Society as a whole has a right to the truth – to know what happened in the past and the reasons and circumstances that led to massive violations. The revelation of the truth and its recording has huge significance to individual victims and relatives as well as society as a whole.

A further point worth making is that the recording of history is important for future generations as well as the current generation. The proclamation recognizes the significance of the truth to the society as a whole. It underlines the importance of educating the people and making them aware of these offenses. Hence, history recording is necessary for public education and public awareness. Moreover, such public education and awareness might lead to the prevention of the recurrence of similar system in the future. However, the proclamation does not refer to the importance of truth to individual victims or relatives. Although, victims and relatives are also part of the public, the proclamation may be questioned for not talking specifically about the satisfaction that a victim and a relative may obtain from the truth.

Clearly, the recording of past offenses was to be conducted not in isolation. It was rather part of the prosecution and judicial process, and thus the truth about the past was to be established through investigation and court proceedings. In this regard, the question whether the judicial process established the truth about the past may be raised.

⁸⁴⁰ Proclamation No. 22/1992; Paragraph 5 of the Preamble

⁸⁴¹ TIETEL, Above n 356

However, a prior question needs to be asked: what was the truth to be established? It might be useful to recall what the proclamation states:

The people of Ethiopia have been deprived of their human and political rights and subjected to gross oppression under the yoke of fascistic rules of the Dergue-WPE regime for the last seventeen years.⁸⁴²

Is not this itself a declaration of the truth? Does not the law itself proclaim the violations, and define the identity of the victims and the perpetrators?

We note that the proclamation also states that:

Heinous and horrendous criminal acts which occupy a special chapter in the history of the peoples of Ethiopia have been perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE- regime.⁸⁴³

It further provides that:

Officials and auxiliaries of the Dergue-WPE dictatorial regime have impoverished the economy of the country by plundering, illegally confiscating and destroying the property of the people as well as by misappropriating public and state property.⁸⁴⁴

The first three preambles of the proclamation clearly assert past violation. Would not it be possible to say therefore that the truth about past violation was already established? This is an official and legislative declaration of past violence and perpetrators. So, what else is to be established? If this is the truth and thus known, what else is to be discovered and recorded? Can one consider the declarations in the proclamation as a general truth, and what remains to be done is to record the details of this general truth? Or is there something else? Despite this, the Ethiopian transitional justice process recognizes the need for establishing the truth about

⁸⁴² Proclamation No. 22/1992; Preamble 1 of the proclamation

⁸⁴³ Proclamation No. 22/1992; Preamble 2 of the proclamation

⁸⁴⁴ Proclamation No. 22/1992; Preamble 3 of the proclamation

the past. Moreover, the truth is to be established and recorded through prosecution and judicial process.

6.2.2 Has the Ethiopian Transition Established the Truth?

This sub-section attempts to present and analyze the available data on whether the truth about the past has been established through the Ethiopian transitional process of accountability. Arguably, the contestation raised regarding justice can also be relevant to truth. The concentration here is on how people evaluate the process in terms of establishing the truth about what happened. In short, the issue is do we think we have discovered what happened in the past.

Respondents were asked the question whether the truth had been established in light of the need of victims or families and the society as a whole. The responses were closely examined and categorized into two. One category believes the truth has been established while the other argues that the process has not resulted in the truth. Some exemplary responses are provided and analyzed below.

Category One: The process has established the truth

A senior government official observed that the process has revealed the truth:

Yes, the truth is to serve justice. There is truth. The Derg system is condemned, and what the top officials did was shown. It is important to avoid the recurrence of similar events; establishing rule of law was necessary. All the arguments for justice work for truth. Is it possible to establish the whole truth, I doubt.⁸⁴⁵

This clearly suggests there is a link between truth, justice, deterrence and rule of law. The truth is to serve justice, and if we relate this point with his earlier opinion on justice, the truth established is the truth about the offenses committed by the Dergue and that the Dergue as a system was a criminal one. The argument is that criminal justice was rendered based on the truth established at court. Clearly, the legal condemnation of the system precedes the judicial

⁸⁴⁵ Anonymous R4, Above n 689

conviction of the members of the Dergue. Therefore, what followed might be a judicial endorsement of the political truth so established by the proclamation. Other respondents in this category expressed similar opinions. Despite this, whether the whole truth was established is doubtful considering certain limitations in establishing the truth. Nevertheless, these limitations seem to relate only to the violations committed by Dergue members and not by other political groups. The government official spoke of nothing in relation to violations committed by such other political groups or the victims thereof. He would have perhaps argued that the focus, in searching for justice and truth, was on state violence, and the truth about the rest was not what was significant.

A former Supreme Court judge expressed a similar opinion:

As I told you earlier, many people were convicted in both Federal and regional courts. At least as far as these people are concerned the facts were established. I guess, there might be facts we have not discovered. Did we reveal the whole account, the whole picture of every individual crime? I think that requires the effort of not only courts but also other organs. However, so much detailed evidence had been introduced. Detailed evidence about the commission of horrible crimes was presented. The courts were presented with detailed accounts of what happened. It is the duty of every one to organize and present for historical purposes those submitted to courts for justice purpose. It is the duty of not only courts but also that of all including the government and individuals. But, I think there are sufficient truths to show the type of terrible crimes committed in this country because the truth has been established...Is it complete? I do not know. Well, according to estimates, about 500, 000 people were killed. I do not think we have an account of each of the 500,000. However, I think a fairly good picture of what happened has been discovered.⁸⁴⁶

This view clearly states that truth was established, but also recognizes possible limitations. This former judge also commented further on what he thought to be limitations in the following way.

⁸⁴⁶ Anonymous R2, Above n 697

There are many limitations. The evidence was submitted in a technical manner like any judicial process. I think what was technically presented to courts should be organized and presented in an understandable way to the family of victims, to the new generation, to commentators and all interested people.⁸⁴⁷

This view emphasises that the truth or sufficient truth was generally established. This is a confirmation of the truth established in the SPO proclamation. However, we also note that the truth about every crime was neither established nor possible. In addition, the lack of publication was raised as the main limitation on public access to the truth established and available in courts. This is a significant limitation in light of the discussion in chapter 4 that the facts need to be publicly revealed and known to the public. Again, no reference was made to violations committed by other political groups.

A former SPO prosecutor notes that “to a certain extent, the process has shown the violations and repression committed during the Dergue as well as the technique and modus operandi of the violations. As one of its objectives was to reveal these matters, the process has clearly shown such facts by producing documentary evidences and through out the trial process.”⁸⁴⁸ He, however, acknowledges the failure to make the truth known to the public:

In fact, there are devices, out side of the ordinary judicial process, that reveal the truth and let the public know about each crime. I believe that was not totally done. Apart from rumours and talks in the newspaper about every individual’s participation, no attempt was made to provide the public with credible and detailed accounts of what happened based on documents verified and accepted by courts. It was not possible to make documents secret and at the same show the public in detail about the horrific nature of the former system.⁸⁴⁹

This former SPO prosecutor further viewed the negative consequences as follows:

The fact that that the activities and works of the SPO were not brought to the public in a better way is a total disaster. Our inability to expose the crime

⁸⁴⁷ Anonymous R2, Above n 697

⁸⁴⁸ Anonymous R3, Above n 682

⁸⁴⁹ Anonymous R3, *ibid*

committed at the time indicates the lack of guarantee against the recurrence of similar events. I really feel very sad about it. In fact, there are situations where some people have publicly appeared as big renowned and respectable elders. It does not mean a person should be insulted or disrepute in his entire life just for the crime he has committed at a certain time. Nevertheless, these people [Derg members] are not giving lesson to the society from that perspective. I do not see them giving lesson, by drawing from their past, either to the government. I see rather the situation taking a different route.⁸⁵⁰

The above views of a SPO prosecutor demonstrate that the discovery of the truth by a certain institution is not in itself satisfying. According to the prosecutor, the truths about the violations committed by the Derg were established through judicial process although it is not complete. However, there is lack of publicity of the truth so established. As discussed in chapter 4, truth serves multiple purposes including the prevention of similar crimes, fighting impunity, providing moral satisfaction, promoting reconciliation, and facilitating social and political reconstruction. In all these respects, it is the knowledge of the truth that matters. In the Ethiopian context, even if the truth was established, the lack of access to the truth might have limited the possibility for effective transition. The above view also emphasizes that the lack of publication has compromised the guarantee against the recurrence of similar events, and has even frustrated the lessons to be drawn from the process. We should also note the comment about the secrecy of SPO documents. We might see the politics of truth involved here. As discussed earlier, the transitional framework was set by the EPRDF regime, which laid down the scope of the truth to be discovered and recorded. This might relate to the question of the politics of truth, the truth is what the speaker (of power) says so, as observed by post modernist thinkers. Again, once the truth was discovered, why was it not disseminated to the public? Is this another aspect of controlling the truth about the truth? Finally, although the SPO prosecutor was very critical of the lack of publication, he did not refer to the role of other political groups or their victims, implying that the limitations he indicates relate only to the violations committed by the Dergue.⁸⁵¹

Another former SPO prosecutor has noted that:

⁸⁵⁰ Anonymous R3, Above n 682

⁸⁵¹ *ibid.* The respondent however admitted that other political groups did commit crimes, and also opined “the SPO did investigate these crimes as well” to establish the truth.

Exemplary facts were established. What the Derge used to commit in secret or in office has been disclosed; Sample facts were established. There may be facts, which we didn't discover and disclose. Regarding evidence of establishing facts, evidence acceptable to courts were submitted and what the government was doing in this country was established; the fact that the government was a killing machine was established.⁸⁵²

This again is similar to previous views that the truth was established. Significantly, the above respondent argues that the facts or truths established through judicial process are indeed authentic and incontestable:

History is very much related with fact-finding process; although not full and complete, we were able to establish the existence of state sponsored violence, that the government used state machinery to kill people. We should also bear in mind that the history of the government is the history of the people. Facts established through judicial process are authentic. You do not have to expect anything from the accused. It is not hearsay. It cannot be contested. Facts established through truth and reconciliation can be contested. The facts established through courts may be few in number. Nevertheless, the issue is not one of number; in terms of fact, it is better and stronger.⁸⁵³

This view emphasizes the superiority of the judicial process in establishing genuine or real facts. In view of an independent and impartial judicial system and processes, this argument may be persuasive. Problems arise if such independence and impartiality is in itself contested. However, even accepting the argument that facts established through judicial process are authentic and incontestable, the limitations of judicial truth are observable from the above response. So long as the accused remains silent, there is a need to prove the truth by presenting adequate evidence, which is problematic in some cases. Hence, at the end, as the respondent stated, only few facts or truths might be established. However, the question

⁸⁵² Anonymous R6, Above n 686

⁸⁵³ Anonymous R6, *ibid*

remains; do these few facts satisfy the need for truth in light of large-scale or massive human rights violations taking place over a period of years?

However, there is an emphasis on the failure to make the truths public as a serious shortcoming of the process:

Publication is very important. Of course, certain activities remain to be done, for example there is a publication problem; we have not made our discoveries public. These efforts and works should not all remain secret. Today, I speak about it. May be no one speaks tomorrow. A lot needs to be done. A lot of work was done. But it is not known much. A lot remains.⁸⁵⁴

This view emphasizes the importance of publication and the failure of the SPO to publicize its works or achievements as well as the implications of this failure. However, pointing to the challenges ahead to the issue of publication, a former SPO prosecutor noted that:

All SPO documents were sent to the Security Affairs Office, not even to the Ministry of Justice. How can you publicize if you do not have access? I think there are problems.⁸⁵⁵

This again raises the question of the monopolization of the truth, and questions whether the truth so established had any significance to the effective transition of the Ethiopian society. A recitation of the points of the fourth respondent might be useful. The truth is about facts, the facts that the Dergue used the State machinery to murder people, and these were authentically established. The other truths were not an issue at all. In addition, he acknowledges the existence of certain limitations in the discovery of facts, and the absence of publication and the secrecy of SPO documents were serious problems. Again, there is no reference to the violations committed by other political groups or the victims thereof.

Of the nature of truth, a Supreme Court judge stated that:

⁸⁵⁴ Anonymous R6, Above n 686

⁸⁵⁵ Anonymous R6, *ibid*

There are two truths. The first is the capital truth. The public knows it. What you establish in court [the second truth] is a small fraction of it. The evidence of the public prosecutor verifies that. But, it is impossible to say these were communicated to the public, for example how much do the public know that Melaku or Gesgis had established committees even unknown to Dergue and killed so many⁸⁵⁶

This view, by making distinction between truths, suggests there is a failure to make the ‘other truths’ or the unknown truths public. This truth relates to the judicial truth. Other limitations of the process were observed as follows:

In rural areas, there are people who had committed crimes out of self-interest (individual animosity). Such crimes were just covered under red terror. How much is known about this. There were cases where the red terror was used as cover to kill people for refusing to hand over martreza [ancient valuable money]. No work was done to give a lesson that as the government creates informal institutions, it is possible they go way beyond its control, and thus only following the legal system is appropriate.⁸⁵⁷

The reservations on the processes of making the truth known is further expressed in the following terms:

The media did not give enough attention. The SPO did not select cases and bring to the public. The truth was not brought to the Ethiopian people. No education through the radio was given. The truth must be disclosed not only of those prosecuted here but also of those dead or otherwise unprosecuted for different reasons.⁸⁵⁸

Several relevant points can be identified from the above responses. The first is the distinction between what the respondent called capital truth and other truths. The public knows the capital truth of what happened in the past. It seems that the capital truth refers to what the law

⁸⁵⁶ Anonymous R31, Above n 713

⁸⁵⁷ Anonymous R31, *ibid*

⁸⁵⁸ Anonymous R31, *ibid*

says is the truth, i.e. that violations and crimes were committed by the Dergue. The other truths are those established by the court, which are according to the respondent a small fraction of the capital truth. He claims that these other truths were not communicated to the public, and the public do not know them. However, this begs the question is it not possible for the public to know the other truths if it knows the capital truths? Second, there are cases where individuals have committed crimes for their own self-interest, and these were not revealed. Thirdly, dissemination of the truth through the media or other forums was very limited at best and non-existent at worst. This is an opinion shared by some of the respondents above. Finally, the disclosure should relate not only to those prosecuted but also to those dead or remain unprosecuted, with the implication that there are people who escaped prosecution. The truth about other political groups is also not an issue for the respondent.

Another Supreme Court judge observed that:

In the trial process, we were searching for, and disclosing the truth. They [the Dergue Officials] were saying what we did was an act of self-defence. They say EPRP was the one that started the killing. It was established EPRP was not the initiator, it was the Derg that was executing people. The evidence proved what the truth was. The fact that Dergue's actions were directed against eliminating its political opponents was proven. Regarding smaller (minor) cases, many people were not prosecuted - they have escaped one or another way.⁸⁵⁹

This view underlines that the judicial process resulted in the discovery of truth although it admits the limitations therein. The truth so established relates to the violations and crimes committed by the Dergue. However, contrary to the respondent's opinion, a court case, over which the respondent presided, do not tell whether the Dergue or the EPRP was the initiator of the violence.⁸⁶⁰ There is a clear indication that many people have escaped prosecution, and

⁸⁵⁹ Anonymous R5, Above n 719

⁸⁶⁰ This researcher has tried to find out whether official documents support this assertion of the Supreme Court judge. Interestingly, the High Court proceedings wherein this judge served as a judge (before being promoted) was published by the Supreme Court, in 2000 E.C, in Addis Ababa. It relates to file No.SPO 401/85 wherein Former leader Mengistu Haile-Mariam and et al, a total of 106 officials and military leaders, were prosecuted. In its judgement, the court underlined the violations committed by the perpetrators against EPRP and other political groups branded as anarchists by the Derg. However, the Court also noted the role of EPRP at the time, and considered this as a ground for leniency of sentencing. Nevertheless, the court was suspicious of who started the killings, and this remains unresolved in court cases. See pp. 474-475. Hence, one may say contrary to the opinion given above, the court cases are reportedly unclear about the initiator of violence between the Dergue

hence limited the truth established. This is similar to previous opinions. Again, this respondent has not referred to violations committed by other political groups.

Another respondent opined that the truth has partly been discovered:

The truth is partly shown. More truth could have been disclosed through truth and reconciliation. What we have now is a judicial truth. They came through evidence and after contestation. There were also things that were not admissible. I think courts are not the appropriate place for searching the truth.⁸⁶¹

This opinion indicates that the judicial process has led to the disclosure of part of the truth. However, it emphasizes that the judicial process with all the procedural requirements is not an appropriate forum for searching and establishing of the whole truth. Interestingly, consistent with his earlier positions, this respondent believes that truth and reconciliation could have resulted in more truths than the judicial process. More over, the respondent also commented on the lack of publication of what was discovered.⁸⁶² Furthermore, his earlier comment on non-inclusiveness of the framework also indicates the incompleteness of the truth disclosed.⁸⁶³ Interestingly, he also refers to other political groups/parties.

A resident in Mekelle has similarly stated that the truth has been revealed in the following terms:

and EPRP. See also “Dem Yazel Dose”, a document published by the SPO in 2002 E.C, p.2. In its introductory part, this document states that “ during these periods [Derg regime], many home grown and rivalry groups raised arms against each other; they had bloods in their hands against each other; innocent citizens lost their lives. Each group was writing and presenting others as responsible for the problem. We do not intend to either write the history of that period or judge the narrations presented by the groups – either left or right. We have neither the capacity nor the desire to do so.” This document, published after the completion of the trial, although recognizes the involvement of different groups in conflict; it does not clearly state who initiated the conflict first. It rather distances itself from the task of presenting the details’. One would also note the implications of these statements on the discovery of the truth.

⁸⁶¹ Anonymous R20, Above n 755. In his opinion presented earlier, this respondent noted “in a court you win a case, but winning a cause is better.” He also remarked that “ a lot of things were not disclosed, and they remained unknown. When you have prosecution, people will not tell the truth for fear of punishment. If a different track was followed people will feel free to tell the truth, and we would have known the truth. We had lost that opportunity.”

⁸⁶² Anonymous R20, Above n 755

⁸⁶³ Anonymous R20, Above n 755. The respondent has commented earlier in relation to the framework that it was not all inclusive saying ‘if others were included we would have a full picture.’ This comment must have also implication on truth. He also opined there that there are people who escaped prosecution.

The Dergue was killing and torturing people. The Dergue committed all sorts of crimes. The prosecutors had shown this.... However, it cannot be exhaustive.⁸⁶⁴

This is more or less consistent with the previous responses. A resident in Addis Ababa similarly observed, “the Dergue’s brutal crimes were exposed in detail.”⁸⁶⁵ It appears needless to present the views of other respondents⁸⁶⁶ because they have similarly opined that the truth was established although they expressed their views differently.

In summing up the views of the first category of respondents, the following points might be highlighted. First, they all believe that to some extent the truth has been established through prosecution and the judicial process. So, judicial truth has been established. In other words, the truth is what has been decided as the truth by courts. Secondly, the truth so discovered is that the Dergue had used the state machinery and committed serious crimes, and of its modus operandi. This is an endorsement of the political truth narrated in the proclamation establishing the SPO. Thirdly, all respondents believe that there were limitations in establishing the truth, and none of them said it was complete. They identified the reasons for the limitations including the inadmissibility of evidence, the escape of some people from prosecution, the enormity of the crimes, and failure to reach the truth about the dead or unprosecuted, and the inappropriateness of courts for the task. However, most respondents raised these limitations to truth only in relation to the crimes committed by the Dergue. There is recognition of the limitation to truth regarding crimes committed by other political groups questioning the appropriateness of courts to search and reveal the truth. Fourthly, almost all respondents criticized the lack of publication or access to the judicial truth. They also indicated the negative results of lack of publication on public knowledge about the past crimes. Clearly, in the absence of public knowledge, the truth loses its significance of contributing to successful transition. Fifthly, some respondents also commented on the secrecy of documents affecting publicity. One respondent actually stated the SPO documents were submitted to the Security Affairs Office and not even to the Ministry of Justice. The secrecy of these documents could limit access to the truth so discovered and their future publication. Is the government controlling their dissemination, and demonstrating the idea that truth is the outcome of power relations. What ever the motive is there are problems of

⁸⁶⁴ Anonymous R13, Interview with the author on 15 January 2013. Mekelle

⁸⁶⁵ Anonymous R15, Interview with the author, August 2013, Addis Ababa.

⁸⁶⁶ Examples include Anonymous respondents R18; Anonymous R13, Above n 864; R33; R 32; and R17

making the truth known. If the truth is not known or remain unknown, it may be difficult or even impossible to have effective transition. Generally, the above responses note that the truth was established as part of the justice process, although certain limitations or challenges were recognized.

Category Two: The truth was not established

Respondents in this category argue that the prosecution and judicial process has not established the truth. Thus, in addressing the issue, a respondent noted:

You are asking me the same thing [referring to the issue of justice]. There is no truth. Truth is indivisible. You cannot be partial to the truth and be just. And as I told you right from the beginning, they [those in power, which he calls the Woyane] were not interested in being truthful, they were not interested in being just, they were interested in expedient process by which they could establish themselves in this country. To this day, there is no truth. Everybody writes, as you said, about truth. Every Tom, Dick and Harry writes everything. And there is no way to sift through this new information that is coming out to inform, better inform, the Ethiopian public and the international public.⁸⁶⁷

This is a categorical rejection of the transitional justice framework for its partiality, and hence one cannot expect truth or justice from it. It also questions the motivations of actions, and stresses the whole process was motivated not by the desire to establish the truth or render justice; rather it was driven by the motive to hold onto state power. The above view strongly criticises the existing narrations of history. What everyone writes about the past is not the truth. Hence, there is a need to sort through the various narrations, identify the truth and better inform the public.⁸⁶⁸

Some critics of the prosecution process hold that the institutions of the state are not impartial, independent and competent to render justice or establish the truth, and even see institutional regression, as reflected in the following view:

⁸⁶⁷ Anonymous R1, Above n 745

⁸⁶⁸ The respondent seems to have partly undertaken this task in a book he published a few months after the interview.

In fact, what we have gone through in terms of justice, court system, the judicial system in general is now down to the gutter. Even the Derg, at the time of the Derg, the courts were respected. The Derg never really abused the courts. The Derg killed people, incarcerated people, tortured people but that was done outside the law. The Derg never used courts to justify its crimes. What is happening now, the court justifies the crimes. You go there and the judges, so-called judges, do not listen to what you say. They listen to what the Attorney General or so called tells them and they pronounce their sentence. That is it. That is as simple as that. So... this shows, in fact, that the whole process of the Special Prosecutors... did not teach any lesson.⁸⁶⁹

Although it is extremely difficult to compare the present with the demonic periods of the Dergue, one needs to consider some relevant points. The first is that justice and truth are related issues, implied from the response that the opinions on justice may also apply to truth. Secondly, truth is indivisible and impartial; hence the conclusion that there is no truth even to this day. What the respondent questioned here is the selectiveness in prosecuting only one side. All perpetrators should be treated or dealt with in the same way. Thirdly, the government was not interested in the truth; rather the whole prosecution and judicial process was self-serving. Fourthly, the courts, rather than being institutions of justice and truth, were and still are servants of the regime - a practice that never existed even during the Dergue regime.⁸⁷⁰ The argument is that Ethiopian courts and judges are not institutions of justice and truth.⁸⁷¹ This would normally lead to the assessment that the prosecution process did not give any lesson; again with an implication on truth.

Another respondent opined that:

⁸⁶⁹ Anonymous R1, Above n 745

⁸⁷⁰ However, no specific instances were raised in relation to the prosecution and trial process of the Dergue officials. Most of the respondents viewed the process as independent and impartial. Even one respondent, R11, who criticized the justice system as a whole however noted earlier that the trial of the Dergue officials fall within the limits of fair trial.

⁸⁷¹ Some sources indicate that Ethiopian courts are generally weak and due process is lacking; See The World Justice Project Rule of Law Index. However, no specific instances were raised in relation to the prosecution and trial process of the Dergue officials. Most of the respondents viewed the process as independent and impartial. Even R11, who criticized the justice system as a whole however noted earlier that the trial of the Dergue officials fall within the limits of fair trial. Nevertheless, as reported by a defence lawyer, R36, some of the convicts still believe that “what was done to them was a drama”, which they never want to speak.

It is really hard to say that the truth has been revealed. We really do not know that the truth has come out to the surface. Yes, there have been some people who had been notorious killers and they had been apprehended. But, do we know the full truth? It is very hard to tell. So, we really do not know or its extent is not known; that is where the matter stands now.⁸⁷²

This clearly suggests that the truths about the past remain unknown even after the conclusion of the prosecution process. This might be attributed to the lack of genuine commitment to reveal the truth as noted below:

I think we are in the same position [in comparison to the time before the start of the process]. The conviction was not followed by the pursuit of truth or pursuit of reconciliation. The prosecution [SPO] was closed; we did not even know when it was closed. So, people were kept in total darkness and they did not know, after the release of these people there was no reference to any trial or any red terror or anything like that. After the release of the people, the whole matter closed. So, there was no lesson taken from it. The matter stopped after the people were convicted and after they were released. There was no further follow up on the matter.⁸⁷³

More over, the inappropriateness of courts to search for truth is noted as “especially in the case of Ethiopia, the courts are not source of finding out the truth.”⁸⁷⁴ He further opined in detail on the absence of reports and any publication regarding the trials, and commented on the inappropriateness of ‘...delivering the SPO documents relating to investigation to the Security [Affairs Office]. Was it necessary to do so? Or was it necessary to make public?’⁸⁷⁵

The above responses highlight the following relevant points. First, the respondent has serious doubts about the result of the prosecution and judicial process. Looking at his responses as a whole, one may categorize him in the second category although his dissatisfactions are not as strong as that of the first respondent. Secondly, he believes, in terms of revealing the truth that we are in the same situation today as compared to the time before the beginning of the prosecution and judicial processes. This again implies that no additional results including

⁸⁷² Anonymous R11, Above n 712

⁸⁷³ Anonymous R11, *ibid*

⁸⁷⁴ Anonymous R11, *ibid*

⁸⁷⁵ Anonymous R11, *ibid*

truth were obtained from the process. Hence, a question arises as to the implication of this lack of truth on Ethiopian transition. As discussed in chapter 4, truth plays a significant role in transforming a society to a better future. The failure of the Ethiopian transitional process to discover the truth may imply the absence of effective transition in Ethiopia. Thirdly, he thinks the whole process was not motivated by the search for truth, a similar opinion expressed by the first respondent. Fourthly, he believes Ethiopian courts are not appropriate institution for searching the truth, an opinion shared by the first respondent. Fifthly, the respondent thinks that there is lack of publication and public knowledge about the entire process; and to use his words ‘people are kept in darkness.’ Six, one can infer the secrecy of SPO documents that were delivered to the Security Affairs Office and that this is not right, an opinion shared by respondents in the first category. The final point is the lack of lesson derived from the process, again an opinion shared by the first respondent. The significance of truth lies in its importance to address the past and to be a foundation of a better future. As discussed in chapter 4, the truth must be revealed, known and be made part of the nation’s history. These aspects of truth are significant to satisfy victims need for justice or historical justice and society’s need to change its social and political system. Thus, all of the points raised above suggest that truth in Ethiopian transition is problematic, and these problems indicate that the Ethiopian transitional justice process could not possibly contribute to the transformation of Ethiopian society.

Another respondent notes that the discovery and revelation of the truth in Ethiopian transition was not successful owing to the inappropriateness of courts for the task.⁸⁷⁶ For this respondent, as opposed to the former once, the inappropriateness does not relate to partiality or lack of judicial independence, it rather relates to the stringent procedural requirements and the objective to punish that is intrinsic in judicial process, and thus preventing the search for and establishment of the truth. This emphasises the challenges of judicial truth discussed in chapter 4. This may lead to the recommendation of other alternatives of searching for and

⁸⁷⁶Anonymous R10, Above n 713. He noted, “in the first place, it is very difficult to expect truth from a judicial/court process. This is because the judicial criminal trial has its own limitation on the discovery of the truth. The accused has many guarantees that tempt him not to reveal the truth. There is the privilege against self-incrimination. He cannot be compelled to testify against himself; only evidence can be brought against him, and even then, he has wide room to contest such evidence. There is the requirement of proof beyond reasonable doubt. He has the opportunity to contest the evidence, disprove testimonies through cross-examination. There are procedural safeguards that are intended to protect the accused and these also, to some extent, prevent the exposure of the truth.”

establishing the truth in the Ethiopian context.⁸⁷⁷ The absence of truth and reconciliation process and the assignment of the task of establishing the truth to courts have prevented the discovery of the truth about the past.⁸⁷⁸ Nevertheless, the discussion in chapter four question the assumption that truth and reconciliation processes lead to the truth. One may argue different kinds of truth can be enabled by different kinds of processes. We should also note the respondent's view that the judicial process has in fact failed to reveal the truth by citing examples. These views clearly question whether the Ethiopian transitional justice process has succeeded in discovering and revealing the truth. This in turn questions whether the transition was successful. This is because the settlement of the past and the establishment of a better future depend on the discovery and revelation of the truth.

Avictim of the red terror and a former Minister in this category opined that:

...Where did the perpetrators appear? Perhaps, only 0.1% might have appeared [before prosecution and judicial process]...There are perpetrators who were not detained even for a day.⁸⁷⁹

He further stated that:

All of us were involved in the past wrongs. Let us get public and acknowledge. We should speak the truth. The solution is to follow the South African path.⁸⁸⁰

⁸⁷⁷ Anonymous R10, Above n 713. He argued, " Even some writers argue that truth can not be revealed through courts rather it may be discovered through other institutions like truth and reconciliation commission. The argument is that people would appear before the commission and tell the truth of what happened and their role; if you hide something or tell only part of it, you would be referred to prosecution. By putting shadow of sanction, truth and reconciliation is the appropriate institution to discover the truth because people will be free to tell the truth. There is nothing that people would be afraid of telling the truth. The truth will rather set you free. That is why South Africa and some Latin American countries have adopted truth and reconciliation. We are in search of truth not punishing people, and truth does not result from court processes; rather results obtained through unrestricted procedure where you uncover many hidden events of the past. There is that kind of argument. Thus, in our case, I would not say the truth was discovered/established.

⁸⁷⁸ Anonymous R10, Above n 713. He pointed out, "If the truth were uncovered, we would not still have been left in darkness as to who killed some people, where they were killed, where they were buried. There are people still missing and in question like the well-known writer Bealu Girma; it was known he was dead, nobody knows about him in the past thirty years; No body said he saw the writer. It is known that the Dergue people, the security people detained him; what is unknown is his whereabouts after detention; there were people accused and arrested in relation to his case; but they never said they killed him nor was his body discovered. Therefore, the situation does not enable to say confidently the truth was established. I think, it is unwise to expect the court process to reveal the truth. I think, it is a failure to understand the process. Thus, from this perspective, I do not think it was successful."

⁸⁷⁹ Anonymous R39, Above n 725

⁸⁸⁰ Anonymous R39, Above n 725

This view, again, emphasises on the inappropriateness of prosecution or the judicial process to the search for truth, and thus favouring truth and reconciliation. The implication is the truth is not established. He also remarked that ‘do the people know about [the past]? What is Ethiopian history? Which history? Whose history?’⁸⁸¹ These questions are important in light of the kind of truth and history that the Ethiopian transitional justice process tries to reveal. We have seen that there are alternative narrations of history of violations during the Dergue regime. Thus, the question ‘whose truth or which history’ is significant in light of the diverse and contested perspectives of history or Ethiopian history. This also begs the question for what purpose and for who may the truth to be revealed. As we discussed in chapter 4, truth has significance for victims or relatives as well as for the whole society. However, if truth depends on what the speaker (of power) says, it might lose its significance. Similarly, the significance of partial truth might be questionable. Thus, a respondent stresses that “it [the process] was a failure right from the beginning; the red terror exercise was a joke.”⁸⁸² These points clearly suggest that the judicial process did not result in the discovery of the truth, and thus had not served as a lesson for the future. Again, the failure to disclose the truth implies not only the lack of proper response to the past but it also indicates that the future is not based on the proper knowledge of the past, thus questioning the foundational aspect of truth.

A resident in Addis Ababa noted that:

I do not think the purpose of the prosecution was to establish the truth. It was to punish TPLF-EPRDF’s former enemies and strengthen its power.⁸⁸³

This view questions the motive of the government in designing and implementing the prosecution process. The motive was attributed to self-interest than the desire to uncover the

⁸⁸¹ Anonymous R39, Above n 725. He questioned history even going back to the period of Emperor Menilik. He posed the questions “ what have we gone through up to now; what is our past history that we travelled through until today; what did Menilik do; we have to raise such questions unless we limit it to what you raised. What did Menilik’s soldiers do in different parts of the country? In Arsi, was not the case that men were amputated? Were not women’s gentiles cut? Why do not we ask these questions?” This questions interrogate the truth in Ethiopian history with an implication that there are different narrations about Ethiopian history. There are contestations for example on the legacy of Emperor Menilik, whom some view as a founder of modern Ethiopian state while others view him as a colonizer and perpetrator.

⁸⁸² Anonymous R39, Above n 725

⁸⁸³ Anonymous R15, Above n 743.

truth, and hence the truth could not be expected from this process. Some residents in both Addis Ababa and Mekelle similarly noted that the truth was not established.⁸⁸⁴

To sum up, first, the respondents in this second category believe that truth was not established, albeit for diverse reasons. Nevertheless, their core view on the transitional justice process in relation to truth appear constant: ‘no truth even to this day’, ‘we are in the same situation’, ‘the ...exercise was a joke’, and ‘do not think..the search for truth was successful’. These expressions appear to be categorical rejections of the process in terms of truth, and are in line with some of the respondent’s preferred modality of truth and reconciliation as considered in the preceding chapter.⁸⁸⁵ The second point worth noting is the view regarding the inappropriateness of the judicial process for searching the truth. This has two aspects. The first is a contextual assessment that leads to the view that Ethiopian courts are not proper institutions to search for truth, because of lack of impartiality and independence. The other aspect did not question the impartiality or independence of Ethiopian courts; rather the argument is that courts in general including that of Ethiopian courts cannot reveal the truth because of the stringent procedural requirements and the focus on punishment associated with judicial process. Both aspects seriously question whether the truth was established in the Ethiopian transition and whether there was any lesson drawn, a question that matters for effective transition. Thirdly, we should also note the view that the incumbent government had no motive or interest to search for the truth, and hence truth cannot be expected from the process. This contextualizes the issue of motivations of justice broadly understood, discussed in chapter 3. Fourthly, we can clearly understand that truth should be indivisible and impartial contrary to the selectiveness or one-sidedness of the transitional justice process. The idea is that all perpetrators should be treated and dealt with in the same way. Fifthly, a crucial point of criticism relates to the lack of publication and public knowledge about the entire process, and even worse the secrecy of SPO documents.⁸⁸⁶ Finally, and most importantly, a critical question is raised as to what history is and whose history is to be recorded, pointing to controversial narratives surrounding the formation of modern Ethiopian state. A question might arise as to the implication of all these points. As discussed in chapter 4, truth plays a significant role both in redressing victims and in serving as a foundation of a better future. The above points suggest that the Ethiopian transition has failed to deliver the truth. This may

⁸⁸⁴ R12, Above n 762; R24, Above n 740

⁸⁸⁵ Some expression though seems to admit that certain truth might have been established; R10’s view is an example but overall he is of the opinion that the truth was not successfully established.

⁸⁸⁶ According to one respondent, the SPO documents were handover to the Security Affairs Office.

lead to the logical conclusion that the failure the Ethiopian transitional justice in discovering or revealing the truth implies the unsuccessful nature of the Ethiopian transition.

In concluding this section, I will highlight the following points in relation to the contestations of truth in Ethiopian transition and the implications thereof. As discussed in chapter 4, truth is an essential element of transitional justice. Although the concept is subject to debate, we can understand it as something relating to the discovery and recording (and revelation) of the facts about past violations. During transition, truth serves various important purposes to victims or their families and the society as a whole. Truth may contribute to the prevention of crime, ensuring accountability, fighting impunity, restoration of peace, the enforcement of justice, the reparation of victim, promotion of reconciliation, and the reconstruction social of and political identity through dialogue and shared history.

In view of these significances of truth, this section ventured to investigate whether the Ethiopian transitional process has established the truth about the past. The analysis of the Ethiopian process poses questions regarding both the space given by framework to search for the truth and the actual results of the process. The Ethiopian transitional justice process clearly incorporated truth as an objective. The discovery and recording of history was sought to be part of the judicial process.

We might say that the Ethiopian transition has foreseen the significance of establishing and recording the truth about the past. As clearly indicated in chapter 2 and this chapter as well, there are different narrations about the Ethiopian history in general and the violations committed during the Dergue regime in particular. In light of this, the incorporation of the truth as an objective of the transitional process was proper. The truth, apart from serving as justice for the victim, creates public awareness, prevents future violations, and reconciles divided communities.

There are diverse views on whether the Ethiopian transitional justice process has established the truth and thereby contributed to effective transition. Clearly, the SPO proclamation had determined the crimes and the perpetrators to be subject to this process, and thus the framework provides a pre-determined general political judgement as ‘truth’. We might argue that the prosecution and judicial process led to the establishment of the truth, however limited it might be. This is an endorsement of the general political truth reflected in the SPO

proclamation. The problem was that the judicial process had no jurisdiction to discover and record ‘other truths or histories’ discussed in chapter two and also indicated in this chapter. Thus, we might argue that the partiality or one-sidedness of the process limited the search for and discovery of the truth as well as its significance to effective transition.

The available data also demonstrates the problematic relationship between the judicial process and the truth as discussed in chapter 4. Procedural safeguards and the emphasis on punishment can possibly limit judicial truth. The available data, including respondents who support the process, demonstrates that some perpetrators [Dergue members] might have escaped punishment due to insufficiency of evidence. This clearly indicates the difficulty of establishing the truth through judicial process.

We should also note the perception that the government was not motivated by the desire to discover and reveal the truth. Truth can be sought through impartial and independent institutions and process, which are allegedly lacking in the Ethiopian context. Such perception casts doubts not only on the discovery of the truth but also on the whole process of transitional justice, and on whether we have successfully departed from the past.

The other point worth consideration is the issue of publication of the truth. It might be argued that the Ethiopian transitional justice process had established the truth (or some truth). However, it is clear that these truths were not brought (sufficiently) to the attention of the public, and even worse, they were kept secret. Thus, a question arises as to the significance of such an unknown truth. How can truth become important to individuals and the society if it remains unknown? Such truth can neither redress the past nor be a foundation for the future. What matters most is the knowledge of the truth.

We may recall from chapter two that, during transition, the interpretation of history, including the history of violence, is not only essential but also the subject to contestations. In light of the contested nature of truth in Ethiopia, one might expect the Ethiopian transitional justice process to establish and clarify the truth about the past. Thus, the above points suggest the truth in the Ethiopian transitional process of accountability is problematic, and hence raises the question whether there have been effective transition.

6.3 Interrogating Other Contributions of the Process

This section aims at investigating whether the Ethiopian transitional justice model has made other contributions. As already indicated the two important goals of the prosecution and judicial process were justice and truth. The issue here is to see the process in terms of other outputs. Some of these other contributions are envisaged in the SPO proclamation. The proclamation particularly talks of public awareness about past violations and deterrence effect of the process, partly discussed in relation to the issue of truth. In addition to these envisaged goals, it is interesting to enquire whether the process has contributed to the rule of law, respect for human rights, the building of effective justice institutions and promoting democracy, reconciliation etc although they were not clearly provided for in the framework. Thus, the purpose here is to investigate how people view the overall contribution of the process to an effective transition, if any.

6.3.1 Other Contributions of the Process: Data presentation and analysis

In this sub section, I will present and analyze available data in relation to the overall contribution of the prosecution and judicial process. The respondents were asked the question what is the overall contribution of or lesson drawn from the process with a possibility to reflect on a range of issues including deterrence effect, rule of law, respect for human rights, democracy, and others. Rather than separately presenting the issues, this researcher thought a more general question would give the respondents the latitude to reflect on the issues they know well and think are more important. The responses were, again, closely examined and categorized into two: those that view the process had positive contributions, and those that say the process had no positive contribution. I have however incorporated the two views in one discussion.

Some respondents assert that the prosecution process has made positive contributions. A senior government official's view may be considered as the official perspective that commends the overall significance of the process:

When I see it together with other measures we adopted, the fact that a constitution was drafted and adopted, and human rights were incorporated in the constitution, I think it is well done. I think we need to draw a lesson that we do not want this

again; never again. We have to continue to develop our democratic system. It is better if journalist, novelists, lawyers, and researchers continue to write the history of the past.⁸⁸⁷

This opinion clearly suggests, first, that the process had positive contributions, and such contribution should not be seen in isolation but together with the broader standard setting and continued process of building a democratic system. Thus, the prosecution process is part of the effort of building a new system. The contribution of the process to the rule of law can also be inferred from the assertion that ‘the best compensation is to create a legal system that works.’⁸⁸⁸ The implication is that although the government did not provide monetary compensation to victims, it had compensated them by establishing an effective system of rule of law. Perhaps, one last point, which may be less relevant here, is the recommendatory remark that we need to take lesson and say never again. Nevertheless, the question whether the process has made all these contributions, particularly when seen in light of the limitations or problems of justice and truth identified earlier remains.

A former Supreme Court judge similarly noted the positive effects of the process in the following manner:

The rule of law is essential to the process of building a democratic system. This is stated in the constitution clearly. Today, it is said we do that under the rule of law. I think that is a big motto. With all its defects, I think, the process was inspired by the desire to create rule of law.⁸⁸⁹

The positive impact of the process is further elaborated as follows:

This is the first time in our history where a head of state was prosecuted and convicted/punished. These people were prime ministers, ministers, head of the security etc. They were not ordinary people. It was for the first time in Ethiopian history that the whole system, those that controlled the state structure, were brought to

⁸⁸⁷ Anonymous R4, Above n 689. However, the respondent recognized that delay was one problem of the process but he attributed the problem to the accused, and the enormity of the crime and number of witnesses and the need to guarantee fair trial. He also opined the need to draw a lesson from it.

⁸⁸⁸ Anonymous R4, Above n 689. This response was given in relation to the issue of reparation/compensation

⁸⁸⁹ Anonymous R2, Above n 697

courts and received justice. Therefore, it is a big contribution for the respect of rule of law and other standards essential for building a democratic system, constitutional supremacy and other related matters.⁸⁹⁰

After narrating the challenges posed at the time, the former judge stressed that:

I do not think, it [the process] can be considered as a total failure as some people would claim. Considering the context at the time, I think, it gave many lessons. I think, the process gave big lesson for those willing and able to draw a lesson.⁸⁹¹

The above view clearly suggests that lessons are drawn that even a head of state and top officials can be prosecuted, no one is above the law, and this might be an important aspect of ensuring accountability and building democracy. Thus, it emphasises that the process, being itself inspired by rule of law, has ensured rule of law, and by so doing, the process has contributed to the building of a democratic system and constitutionalism. Moreover, the respondent is wary of criticisms against the process and asserts it is not a total failure. What is the implication? Is he conceding the existence of some failure in light of the challenges he recited? Finally, there is also a doubt about the willingness and ability to draw lessons from the process. Nevertheless, some residents⁸⁹² in Mekelle and Addis Ababa have similar opinion. It is noted that “the process gives lesson to people, the leaders and the future generation that a criminal would not escape punishment.”⁸⁹³ The main lesson to be drawn is that government officials can be held accountable for violations they commit. The question that arises is whether the present government, the various political groups and the society as a whole has indeed drawn lessons.

The views of other respondents contest the above point that the process has contributed to deterrence or rule of law. Thus, a respondent argues the process has not served as deterrence, as observed in the following view:

⁸⁹⁰ Anonymous R2, Above n 697

⁸⁹¹ Anonymous R2, Above n 697. These lessons refer to the fact that no government official will be immune from accountability. He noted the challenges as new introduction of judicial system in some regions and the lack of trained judges. He commented that establishing courts, training people and entertaining the Derg cases was done in parallel, and asserted if the situation had happened now, the courts are better equipped.

⁸⁹² Interview Anonymous R13, Above n 864; R33; R32; R17; R18

⁸⁹³ Anonymous R 18, Interview with the author, Mekelle.

It [the prosecution and judicial process] did not contribute an iota of the restraint on the part of the leaders. The same thing has been repeated over and over again during Meles's regime, during Meles's reign. People have been killed, and many have gone away with impunity. The 2005 killings have never been accounted for and there were several other killings that have not been accounted for. And, those who ordered the killings... didn't take any lesson from red terror trials. So, it shows you that the red terror trial was total failure, in fact in terms of being an example or deterrent to the future leaders. So, this is one sad story about the Ethiopian justice system, that people have gone away with impunity. Impunity still reigns in Ethiopia. And it has reigned time and over and over again not only during the Dergue regime but to the present day. People still are not accountable for their actions. And there are several of them. The government admitted close to 200 were killed during the 2005 elections; and no body has been prosecuted or held accountable for these horrendous killings. So, the story goes on and the same applies in the rural areas; government officials are not held accountable. And, impunity still reigns in Ethiopia just as it did during the Dergue's regime.⁸⁹⁴

The above opinion clearly stands in contrast with pro-prosecution arguments, discussed in chapter 4, that prosecution is the most effective deterrence against future violations. It can be counter argued that the prosecution in Ethiopian was not properly conducted, and hence cannot diminish the value of prosecution. Nevertheless, it is observed above that the prosecution process had not deterred the current regime; it is accused of committing similar violations, and thus no lesson was drawn. Again, we might recall, from chapter 4, that disallowing impunity and adherence to the rule of law is a legitimizing factor for a post-conflict or post-authoritarian regime. Thus, what appears more troubling is that those who killed in the post-Dergue period were not held accountable, and hence impunity still reigns in Ethiopia. Finally, the trial was considered as a total failure, which generally questions whether there is a successful transition at all.

Although clear in the above view, the process is also criticized for its failure to contribute to the rule of law:

⁸⁹⁴ Anonymous R11, Above n 712

No, far from that...[establishing rule of law]. Actually the greatest weakness of EPRDF is the fact that there is total failure of the justice system here, especially in matters that have political connotation; the person accused of any political crime for example such as terrorism or attempt to overthrow the government, the matter is already lost; from the time that it was filed, the person is convicted. And, we have seen time and again that any case that involves any political dispute with the government, I do not think there has been any case of acquittal. Every one has been sentenced to the severest punishment be it on terrorism, violation of the constitution or attempt to overthrow the government and so on. So, to say the red terror trial...personally, I don't see any benefit that we have driven from it; not at all; nothing has changed; more of the same; more of the old.⁸⁹⁵

Again, the discussion in chapter 4 emphasise on the role of prosecution in building justice institutions in post-conflict and post-authoritarian regimes. The above view argues the Ethiopian prosecution process has not contributed to the building of an effective and impartial judicial system; rather the justice system has totally failed because of lack of impartiality and independence. The process was seen as having no benefit at all. Again, this contests that no transition took place in Ethiopia.⁸⁹⁶

Some residents in Mekelle and Addis Ababa share the above view that the process had no positive contribution.⁸⁹⁷ I think it would be sufficient to state what one respondent opined:

If you see the things that happened after the fall of the Dergue, you observe that very few changes occurred. The police and officials violate human rights without being held responsible.... The people are still afraid of the leaders. There is no democracy.⁸⁹⁸

This clearly suggests that the prosecution process has not changed the political identity of the state. It suggests the process has not served as a foundation of a new legal and political system.

⁸⁹⁵ Anonymous R11, Above n 712

⁸⁹⁶ It may be important to note the comments that there is no significant difference between the Dergue and the present regime in terms of deterrence and rule of law, and arguably in terms of human rights and democracy, although this ultimate equalization of the two regimes may not be necessary here.

⁸⁹⁷ Interview with anonymous respondents R24; R15; R12

⁸⁹⁸ Anonymous R 15, Above n 762

Nevertheless, a former SPO prosecutor forwards a counter-argument as follows:

We can witness a better experience not only to Ethiopia but to Africa as a whole. It is a departure from the past and a new experience; it was a country where the incoming government used to exterminate former officials. Now we have a better experience, [which] was done through independent prosecution and independent judicial process.⁸⁹⁹

Considering the long history of violations and political justice pronounced by incoming leaders, the prosecution process could be considered as a better experience for Ethiopia, and even for the whole of Africa. We should also note the view about the independence of the prosecution and judicial process, impliedly that of prosecutors and judges, in the discharge of their duties implying the existence of legal justice.

However, such view is not acceptable to a respondent Mesfin who has criticized the process for being not right from the beginning, did not teach any lesson, and that what we have today is a continuation of the same thing with the actors changing.⁹⁰⁰ He further noted that:

As I told you ...it has gone from bad to worse...There is no transition in any sense of the word; the only thing, the conditionality is, removal of censorship.⁹⁰¹

This view strongly underlines that the prosecution and judicial process has no contribution at all. Although it is extremely difficult to defend the idea that ‘things have even deteriorated’, this view clarifies the deficiencies of the process to transform the society. It is emphasized that there is no transition in terms of establishing rule of law, respect for human rights and democracy. Such views strongly contest the transformative role of the prosecution process.

The institutions of justice, far from benefiting from the process, are viewed as following a regressive route as noted below.

⁸⁹⁹ Anonymous R6, Above n 686

⁹⁰⁰ Anonymous R1, Above n 745

⁹⁰¹ Anonymous R1, *ibid*

The justice system totally, the judicial system, the police, the Attorney General Office, the courts, these are really gone down...down..down. They have never been as low in my lifetime in Ethiopia as they are now.⁹⁰²

This might be the harshest criticism of the process in terms of building justice organs. Nevertheless, it clearly reflects a strong dissatisfaction with the functioning of justice institutions, criticized as falling far below the standard. This really contests the idea in chapter 4 that prosecution would help build and strengthen justice institutions and rule of law.

Interestingly, a former SPO prosecutor considers the failure to build a strong, credible and reliable justice system as a missed opportunity, as reflected in the following view:

When the court was reorganized, began to see the case in full independence, it was expected to ensure that similar events will not be repeated. It was expected to strengthen this by considering the cases of the Dergue or former regime in fairness and at the same time, the court is expected to increasingly strengthen its credibility and reliability. However, I do not think the credibility of the court has increased so much; the same is true with its reliability. The focus was not on institution building rather, especially in the court system, there seems to be a desire to win fame for individual judges. Any way if similar violations are committed, we have not created a reliable court, a court acceptable to the people, which will properly see the case and decide. This is one missing opportunity. Now, rather it is in a regreteable situation. Nevertheless, this could have been one test case in establishing or creating sustainable institutions.⁹⁰³

This view emphasises the failure to create proper institutions of justice and thereby the rule of law. This view could logically suggest the failure to establish institutions of democracy and an accountable government.

A Supreme Court judge observes the positive over all contribution of the process in the following manner:

⁹⁰² Anonymous R1, Above n 745

⁹⁰³ Anonymous R3, Above n 682

No one escapes punishment if he commits crime. It would give lessons, to those currently on powers or to any one that comes to power, that there is huge accountability. From the point of the violations, the punishment may be lenient. However, it is sufficient from the perspective of human rights and establishing democratic system.⁹⁰⁴

This opinion highlights the positive contribution – its contribution to the fight against impunity, ensure accountability and rule of law as well as the giving of lessons even to those in power, which stresses the deterrence effect. Arguably, and as recommendatory, it would give a lesson to the society that it could have benefited a lot had a generation of intellectuals were not killed. It also underlines that the process had sufficiently contributed to respect for human rights and building democratic system – emphasizing the importance of rule of law and accountability to democracy. As indicated above, some respondents contest this argument. However, it might be useful to consider the view of a former SPO prosecutor, who rate the process positively in relation to justice and truth, is critical of the process on the other contributions of the process:

One expected outcome of the process is the establishment of rule of law; but one can see a big failure here. This government has not refrained from committing more or less similar activities. I do not think the purpose intended to be achieved through the works of the SPO were actually achieved because of the continuation of similar acts/the legacy of the past....I think the process was totally weak, totally weak, in terms of establishing rule of law, ensuring human rights, reconciliation and other desirable outcomes except justice.⁹⁰⁵

This clearly emphasises the dissatisfaction with the process not to prevent similar violation. If violations continue to exist, there is no departure from the past and there is no effective

⁹⁰⁴ Anonymous R5, Above n 719. He also noted, “a whole generation was lost. If these were alive, they could have contributed a lot for the country. A person who thinks can draw many lessons. How could a government kill its people across the board? What led the perpetrators to this? What was there capacity or qualification? When the people elect its government, it has the competence to rule. One that comes through force has no competence to rule and is thus destructive. People should always be aware so that nothing similar will happen.” These views, apart from questioning the legitimacy of governments that commit violations, also emphasises that the society should watch over the non-recurrence of a form of government that is similar with the Dergue and that commits crimes. State power should be exercised upon people’s will, an essential component of democracy.

⁹⁰⁵ Anonymous R3, Above n 682

transition. The continued existence of violations imply the failure of the process to serve as deterrence, the lack of rule of law and respect for human rights as well as the failure to positively contribute to other desirable goals.

The former SPO prosecutor further noted that:

There were times when the government has even galvanized killers and *mass* murderers/extermimators/ butters /annihilators. One may say this is the weakness of the government/state. The results of transitional justice are many. So, apart from the conventional justice we expect to achieve, there are other things. These were not achieved. I am telling you this being disgruntled. In fact, this is not my feeling alone; even the head of the Special Prosecutor Office has similar feeling. Thus, all that efforts should have prevented the recurrence of similar events.⁹⁰⁶

This view, apart from stressing the point that the process has totally failed to make these other contributions, also underlines that the government even gave cover and protection to some former murderers; a point shared by another respondent in relation to the legal framework.⁹⁰⁷ It also emphasises the enormity of dissatisfaction of not only this particular SPO but also that of the Chief of the SPO with the process.

Another Supreme Court judge argues, “the process had some contributions to rule of law, respect for human rights, and democracy.”⁹⁰⁸ However, this positive appraisal is followed by frustration with some government actions:

The government seems to act instinctively; there is disparity between when the constitution was adopted and what happens later on. There is a feeling of inconsistency. This deserves attention. Certain acts of the executive lead to frequent

⁹⁰⁶ Anonymous R3, *ibid*

⁹⁰⁷ Anonymous R1, Above n 745. He even gave names as examples of EPRP members who joined the government. Another respondent, a victim of Red Terror, R39, also indicated that some Dergue members joined the government. Based on this information and personal observation, this researcher came to know that EPRP and Dergue members were given high positions in this government, including some involved in the interviews conducted for this study. Nevertheless, despite all efforts, this researcher has not found any independent evidence, reports or other documents implicating these people in violations of the past. However, the opinion that the government gave shelter to some violators cannot be dismissed as invalid especially in light of the diversity of the respondents – victim, former SPO and human rights activist and former opposition leader. At least the perception that such exists can affect the transitional process.

⁹⁰⁸ Anonymous R31, Above n 713

and boundless interference with judicial independence. Convicts should not walk free just a week after conviction. The government was representing victims in all of this. Releasing convicts without forgiveness from the victims creates dissatisfaction. We should take a lesson from these.⁹⁰⁹

Despite some perception of positive contributions, the judge is also wary of government interferences with the judicial process, and non-consultation with victims as negative consequences. This suggests the lack of independence of justice institutions and clearly demonstrates the discontent of victims. Interestingly, one should also learn from these failures of the transitional or post-transitional justice process.

A former High Court judge takes a cautious approach in his assessment of the process:

The process has some deterrence effect, including on those in power. However, i do not have empirical data, but I cannot say it has no positive effect. Were there similar incidents after the Dergue? Were there disappearances? I think this is a different issue...One should also see the other measures taken during transition to reconstruct the country. Were there problems in such process?⁹¹⁰

This view, although doubtful, recognizes some level of deterrence effect of the process. According to the respondent, an empirical data as to whether similar violations are committed to day is necessary to test the deterrence effect.⁹¹¹ It is also clear other measures taken to reconstruct the country should also be considered when evaluating the effects of the process.

A victims' family clearly suggested the importance of the prosecution process to the rule of law and accountability:

The justice process shows that no one is above the law. The people who killed our children were punished. This is a big lesson for any one.⁹¹²

⁹⁰⁹ Anonymous R31, *ibid*

⁹¹⁰ Anonymous R20, Above n 755

⁹¹¹ However, one may also consider the importance of some indicators like accountability, rule of law and openness to opposition.

⁹¹² Anonymous R8, Above n 704

This view is, however, challenged by another victim, who observed, “the red terror exercise was a joke.”⁹¹³ This is a summary of what the respondent said regarding the outcomes of the prosecution and judicial process. Thus, one may infer that the process had not contributed to rule of law, human rights respect, democracy and reconciliation. He does not see any contribution of the process, an opinion shared with the above respondents. It is interesting to recollect that this respondent had criticized the prosecution process as not the appropriate solution and preferred the truth and reconciliation process like that of South Africa, an opinion shared by other respondents as well. He also opined that his torturer had, after change of government, joined the EPRDF government and even caused the arrest of the victim even under the EPRDF regime.⁹¹⁴ Here is an implication that the incumbent government had protected some of the former torturers/violators, an opinion shared by some of the respondents above. He has also opined that there is no dialogue and even communication between the leaders of the different political parties.⁹¹⁵

Another respondent noted the following on the overall contribution of the process:

The effort to bring about accountability through national institutions - unlike Rwanda and Yugoslavia - can be considered as a positive result. It has shown that anybody can be held accountable.⁹¹⁶

The success of the process here lies in ensuring accountability at domestic institutions that might be close to the primary stakeholders. It might have shown that no one is above the law so that we can infer its contribution to rule of law, deterrence and respect for human rights. However, how much lesson is drawn from the process is doubtful as noted below.

Nevertheless, I think some people still do similar things hoping either that evidence against them will not be found or they may be granted amnesty or pardon just like the

⁹¹³ Anonymous R39, Above n 725. He had commented on the lack of public knowledge about the red terror trials, opined that his torturers walk free and do their business in Addis, and commented that he did not even give information to the SPO at the time because he did not think prosecution was the solution.

⁹¹⁴ Anonymous R39, Above n 725.

⁹¹⁵ Anonymous R39, Above n 725. He remarked do you see our political leaders talk to each other. Do they have tea together? do they appear together in public events?

⁹¹⁶ Anonymous R10, Above n 713

convicted Derg officials. There is also a saying that you cannot accuse the king, you cannot till the sky⁹¹⁷

This clearly questions the deterrence effect of the process partly because of the culture of violence and partly due to the problems in the process. The view clearly emphasises that there is a continuation of similar violations although not necessarily of the same nature and degree as that of the Dergue. Moreover, the absence of reconciliation is seen as a major shortcoming:

The lack of reconciliation can be seen as a weakness. In the history of this country, many political groups resorted to violence to eliminate each other. Although reconciliation with the Derg was not necessary, it could have been made between the other political groups. The lack of reconciliation is a reflection of lack of accommodation and compromise in our political culture; rather the politics was based on eliminating rivals. The different political groups were eliminating each other. Even the incumbent passed through that process, but is no better than the Dergue. The incumbent is not seen accommodating other political groups. I think, the lack of political accommodation will continue as long as that generation exists. The government is lacking the patience and wisdom in entertaining things. That is hurting us.⁹¹⁸

Although some positive contributions were noted above, these problems associated with the process has led the respondent to conclude, "I think, it is a mixed result."⁹¹⁹ Again, the critical problem given emphasis is the political polarization in this country and the absence of any reconciliation effort among at least some political groups. Ethiopian history is replete with political violence against rival political groups. Among other things, the lack of compromise and political accommodation has led to the red terror-white terror campaign, which claimed the lives of so many Ethiopians. This way of thinking and division persists in today's political life. Although equating the incumbent government with Dergue might not be defensible, the incumbent that passed through this violent past is criticized for not taking the initiative to promote reconciliation and political accommodation. The old thinking of eliminating rivals or lack of political accommodation has effects not only on the present but

⁹¹⁷ Anonymous R10, Above n 713

⁹¹⁸ Anonymous R10, *ibid*

⁹¹⁹ Anonymous R10, *ibid*

also is likely to continue in the future until a new generation of politicians come up, with a new way of thinking about politics. Here, one would see the frustration that things will not change as long as politicians of the past (be in government or opposition) are active in politics.

A former SPO prosecutor also commented on the absence of reconciliation that he thought was expected at the end of the process and the consequence as follows:

The other purpose of this process was to establish rule of law and to promote reconciliation. Reconciliation was expected at the end of the process. The perpetrators denied their involvement, they had exercised all their rights and defended themselves but the court had found them guilty based on the evidence brought. Once this was over, an opportunity for reconciliation among the society was expected by creating forum for the perpetrators to openly express their remorse; this was good for the victims or families, the nation, the system, and for all. There is a big failure on this.⁹²⁰

Although there is no indication in the legal framework, the former prosecutor thought that reconciliation would follow the legal and judicial process. Clearly, it emphasises that reconciliation was necessary but not materialized.

It is interesting to look at the view of another SPO on this issue. Although he argues that the process has made positive contributions above, he also commented on what he thinks is missing:

There is political polarization. When you ask who these politicians [who ask for reconciliation] are, the answer is clear. They are the same people of the past. It was people of the past still active today. You can look at the 2005 election. Who were confrontational? It were the people who were members of EPRP or Dergue. Look the politicians in the Diaspora. What do they learn from the countries they are living in? Why they do not struggle through peaceful means? It is not a lack of awareness of the system where they live. All these polarization is the outcome of

⁹²⁰ Anonymous R3, Above n 682

their previous way of thinking. They do the same politics; they want it repeated. This country was ruled for 37 years by one generation. Now, the trial is over, and something has to be done to bridge the gap, perhaps through reconciliation and dialogue.⁹²¹

Here, we find the central problem in Ethiopia that is political polarization. This view interestingly presents opposition political groups or people from the past as responsible for confrontational politics. This political polarization has led to serious political problems reflected in the massive confrontational electoral processes of 2005, which was referred to earlier by another respondent blaming the government. The controversies surrounding this election and its implication for Ethiopia's political transformation and the respect of human rights were the subject of closer examination.⁹²² These different views demonstrate that the existing polarization resulted from the old way of thinking about politics, perceiving other political groups as enemies, worth eliminating and the culture of intolerance and lack of political compromise and accommodation. This implies that the transitional process has not succeeded in addressing political and ethnic division within the country, which however impinges on the reconstruction of a democratic society. These points may emphasize the need for dialogue and reconciliation to bridge the political gap.

In this section, the researcher sought the views of the respondents on the contribution of prosecution and judicial process to other desirable goals of transitional justice including ensuring the rule of law, prevention of similar violations, accountability, and respect for human rights, democracy, and reconciliation. It is needless to repeat the details of the data. However, I will briefly present the summary of the main points and the implications thereof.

⁹²¹ Anonymous R6, Above n 686

⁹²² See for example Lahra Smith, Political Violence and Democratic Uncertainty in Ethiopia, Special Report, United States Institute of Peace, Washington D.C, August 2007. [Accessed on 30 February 2014]. Available from the World Wide Web: <http://www.usip.org/sites/default/files/sr192.pdf>. For more on confrontational politics and the problems relating to democratization in Ethiopia see Pausewang, Siegfried, 2004: *Local Democracy and Human Security in Ethiopia. Structural Reasons for the Failure of Democratisation*, Johannesburg: South African Institute of International Affairs (SAIIA Report No. 45). See also Pausewang, Siegfried, Kjetil Tronvoll and Lovise Aalen (eds), 2001: *Ethiopia since the Derg. A Decade of Democratic Pretension and Performance*, London, New York: ZED Books.

The data about the contribution of the process to other desirable goals is a mixed one. We see, on the one hand, opinions that emphasise the prosecution and judicial process had some positive contributions to (a) rule of law and constitutional supremacy, (b) deterrence, accountability and fighting impunity, (c) human rights, (d) democracy, (e) independence of the judicial system, (f) educating the people, (g) the competence of national institutions. The supporters of the prosecution process, however, acknowledge the existence of some limitations or weakness. These include (a) the lack of dialogue and reconciliation to address political polarization, and lack of initiative by the government to promote reconciliation and political accommodation, (b) interference in the judicial process, (c) non-consultation with victims, in deciding to release convicts, and (d) the implications of the deficiency in the process leading to a possibility for similar violations. Despite these limitations, the positive contributions are presented not only in their purely formal sense but also as a political reality.

However, these alleged positive contributions might be questioned in light of all the problems identified in relation to truth and justice. This is also questionable in light several sources that rated the country's performance on the above indicators.⁹²³ In addition, other respondents seriously contest the above-mentioned positive contributions of the prosecution and judicial process. They stress that the process had no or little contribution, if any, to the rule of law, deterrence, human rights respect, democracy, reconciliation and other desirable things.

The data clearly suggest the continuation of the culture of violence and the lack of accountability. In light of this the deterrence effect of the process and its contribution to rule of law and respect for human rights is questionable. The perception that the government gave protection to past violators delegitimizes and negatively affects the transitional justice process. Another serious problem is the inability to create impartial and independent institutions of justice and democracy, without which there cannot be a successful transition. As we have discussed in chapter 4, reconciliation is an essential element of transitional justice process that has the potential of ending cycles of violations. In this respect, the Ethiopian transitional justice process has neither envisaged nor carried out reconciliation processes. This in turn has sustained political and social division, the culture of antagonistic and confrontational politics perpetuating cycles of violence. All these points contest the transformative role of the Ethiopian transitional justice process.

⁹²³ See the Economist Intelligence Unit, Democracy Index, 2010; The World Justice Project Rule of Law Index, and the Bertelsmann Stiftung, BTI 2012 – Ethiopia Country Report.

Concluding Remarks

To sum up this chapter, this researcher sought whether the Ethiopian transitional justice has incorporated truth as its goal and whether and the extent to which the truth is thought to be established. This chapter also tried to assess whether the prosecution and judicial process had contributed to the rule of law, accountability, and the respect for human rights, democracy, reconciliation and other desirable goals. It also presented the implications thereof on the future on Ethiopian society.

There are fundamental differences of views on the Ethiopian transitional justice process in terms of its ability to establish and reveal the truth and its overall contribution to the Ethiopian society. A closer examination of the data presented reveals the following key points that are relevant to the analysis and understanding of transitional justice in the Ethiopian context.

The discussion in chapter 4 clearly indicates that, although the concept of truth is controversial, truth is a crucial element of transitional justice, and hence societies in transition need to devise proper mechanisms of discovering and revealing the truth. As already indicated in chapter 4, truth has significance to both the individual and the public. It is a form of redressing the past as well as a basis for building a better future. When we look at the Ethiopian transitional justice process, it incorporated truth as one of its goals. In view of the contested nature of truth or history in Ethiopia, the incorporation of this objective might be important to settle the past and build a new and better system. A further question relates to the issue whether we think the truth was established. The available data reflects the diversity of views on this issue ranging from those that fully endorse the process to those that fully discredit the process. The existence of such diverse and competing views has important implications on the transitional justice process and on whether there has been successful transition.

Clearly, the Ethiopian transitional justice framework has set out the violations and violators to be subjected to the process. The Dergue was the violator, and the violations were those committed by the Dergue. By defining the crimes and the perpetrators, the SPO proclamation had provided a pre-determined general political judgement as to what constitutes the 'truth'.

Although the prosecution and judicial process is entrusted to discover and record history, this is constrained by prior political judgement and whatever is established through this process can only be an endorsement of the political truth set out in the SPO proclamation. In light of the different narrations of history presented in chapter 2 as well as revealed through the data introduced in this chapter, the term of reference for the discovery of the truth is problematic because the judicial process had limited jurisdiction. We now know that other actors had also committed human rights abuses. Thus, the most significant weakness of the Ethiopian transitional justice process is its partiality in the search for and discovery of the truth. Even if one might argue the judicial process has established the truth, this can only be part of the truth or one version of truth. It is really difficult or impossible to properly address the past or create a new system based on such partial truth.

As indicated in chapter 4, one problematic issue is whether judicial process is suitable for the search and establishment of the truth. This chapter emphasises this problematic relationship in the Ethiopian context. Truth relates to the establishment of facts about past crimes. Even strong supporters of the judicial process admit that some Dergue members have escaped justice because of lack or inadequacy of evidence. This suggests that there are facts that the courts did not discover and reveal. One may however ask whether the discovery of the whole truth may be possible. This may arguably be impossible even through truth commissions. However, the problem of the discovery of the truth here is compounded due to stringent procedural requirements and other perceptions like the prior destruction of evidence, and the human and other resource constraints surrounding the judiciary and the prosecution offices.

The other point worth noting is the perception that the government had no motive to discover and publicise the truth. Such motivation or lack of it may be reflected in throughout the transitional justice process or afterwards. The issue of one-sidedness may be one such reflection. The absence of credible and independent institutions of justice or truth and the continued existence of violations can be another manifestation of lack of commitment to truth. These points highlight not only limitations on the discovery of truth but also whether the truth has been established at all and whether there has been any meaningful transition.

The other point that emerges from the discussion in this chapter is the question of publication of the truth. The discovery of the truth through some mechanism is not sufficient for a society in transition. The truth should be known and available to the public so that its members or the

public as a whole could make sense of it. It is the knowledge of the truth that plays the important functions as we discussed in chapter 4. The discussions in this chapter demonstrate that, in the Ethiopian context, the truth was not public and even worse it was kept secret. Such hidden truths amount to no truth and could not possibly have significance.

These abovementioned problems emphasise the point that the Ethiopian transitional justice process of establishing the truth was problematic, and hence raises the question whether there have been effective transition.

In this chapter, the researcher also sought the views of the respondents on the contribution of prosecution and judicial process to other desirable goals of transitional justice including ensuring the rule of law, prevention of similar violations, accountability, and respect for human rights, democracy, and reconciliation. Again, the available data indicates diverse responses that range from those who identified only the positive contribution through those that identify some weakness to those that express mixed results as well as those that view the process as a total failure. These views highlighted certain points worth considering.

One significant point is the perpetuation of the culture of violence and impunity. One of the main arguments for transitional justice as a whole and prosecution process, in particular, is such processes could have strong deterrence effect, and that this could promote rule of law and accountability as well as advance the building of a rights respecting and democratic system. The continuation of violence and human rights violation in Ethiopia therefore suggests the failure of the process to serve as deterrence or promote accountability, human right or democracy. If sufficient lesson was drawn from the prosecution and judicial process, such practice could not perpetuate. Hence, the continued existence of similar violations and the absence of accountability imply the absence of any significant transition in Ethiopia.

Secondly, transitional justice processes are meant to be undertaken in an impartial and independent manner thereby contributing to the creation and maintenance of credible and reliable state institutions including institutions of justice and democracy. The building of a new system requires the building of credible and reliable institutions, which is questionable in the Ethiopian context. The data presented poses serious problems relating to its inability to create impartial and independent institutions of justice and democracy, without which there cannot be a successful transition.

A final point worth mentioning here is the question of reconciliation. The discussion in chapter 4 emphasises the importance of reconciliation in ending legacies of violation and bring about better future. The data presented in this chapter suggests there was a strong need for reconciliation in Ethiopia. However, reconciliation neither was incorporated into the Ethiopian transitional framework nor was promoted practically. The absence of reconciliation means the perpetuation of division, suspicion, among members of the society as well as the perpetuation of political extremism and political violence. There is no room for dialogue and accommodation of differences. Such perception clearly suggests the transitional justice process has not really transformed Ethiopian society into a new social and political identity.

Generally, the closer examination of the data in this chapter suggest whether the prosecution or judicial process has led to the discovery of the truth or contributed to other desirable goals is problematic and these problems seriously contest whether there was effective transition in Ethiopia.

CHAPTER SEVEN: CONCLUSIONS AND WAY FORWARD

Introduction

The people of Ethiopia had been subjected to successive imperial regimes, and lacked any rights or protection against the government. It was rather the emperors and the nobility that had rights against the people who were treated as servants. However, towards the mid of the 20th Century, the people of Ethiopian began to seriously question the authority of the imperial regime. This ultimately gave rise to popular uprisings in different parts of the country. There was growing opposition both in urban and rural areas. Such opposition has gained support from Ethiopian intellectuals and members of the Army. There were strong student movements against the imperial regime. As a result, the last imperial regime of Haile-sillassie ended in 1974, giving rise to a military regime called the Dergue under the leadership of Colonel Mengistu Haile-Mariam. The military took power under the name Provisional Military Administration Committee (Dergue). Although the Dergue was proclaimed as a provisional government, it ruled the country for 17 years along the lines of a proclaimed socialist ideology. However, there was opposition to the Dergue right from the beginning particularly by various political groups that had their origin in the student movements including EPRP, Me'son and others.

Immediately upon coming to power, in the name of the revolution, the Dergue killed high officials of the imperial regime, the emperor, and the Patriarch of the Ethiopian Orthodox Church. This event was followed by a period of terror coined as red-terror and white terror, resulting in the death of hundreds of thousands of people, torture, arbitrary detention, forced disappearances and other crimes. In general, the whole period of the military regime was one of the darkest periods in Ethiopian history. The military regime was toppled in 1991 through an armed struggle carried out by different armed groups, particularly by the EPRDF. The fall of the military regime created an opportunity for transition towards rule of law, respect for human rights and democracy. In 1991, a Transitional Government of Ethiopia (TGE) was established according to the Charter for the Transitional Period. The TGE was composed of different political groups, with EPRDF having the majority of seats. At the same time, members of the Dergue were arrested in different parts of the country, and the TGE begun

preparations to prosecute human rights violators during the Dergue regime. In 1992, the TGE established the Special Prosecutors Office with a view to investigate and prosecute former members of the Dergue for crimes they committed.

As enshrined in the SPO establishment proclamation, the incoming government of Ethiopia chose to deal with the past by adopting prosecution and judicial process. This might be a breakthrough considering Ethiopia's experience of violent transitions. The manner of dealing with former Dergue leaders was a new experience compared to previous experiences when the incoming leaders do whatever they want. As indicated earlier, the Dergue killed the last Emperor and its top officials. Even, going back in history, new leaders used to kill former leaders or incapacitate them. Therefore, the fact that the EPRDF government did not outrightly kill the Dergue leaders and members and choose non-violent legal method might be considered as a big step in breaking the cycle of political violence against former leaders. What followed was a large-scale prosecution of former leaders and their affiliates for the systematic and gross violations. Irrespective of all constraints, the process was purely a national process in the sense that it was conducted by national institutions and according to national laws. In these and other respects, the Ethiopian transitional process of accountability may be considered as a landmark case for the country. It is a landmark case because, unlike international prosecution, it is a large-scale prosecution of former leaders before national tribunal so close to the society affected by violations. Secondly, it is a departure from previous experiences of the country where incoming leaders deal with former leaders as they wish. It is the first time in the country whereby former leaders were dealt with legally however contested the process may be. The Ethiopian context also provides important insights and serves as an example of the problem of transitional justice.

This research has inquired whether the Ethiopian model has successfully addressed transitional issues of justice, truth, reparation and reconciliation and thereby contributed to effective transition. The inquiry focused on two aspects - the framework and the outcomes. The connection between the two is undeniable. However, these issues were treated separately to make the consideration of the implications that follow from the adopted transition process more structured and focused. Clearly, the process involved is not the main subject of discussion, and hence is dealt with only when it becomes relevant either to the framework or to outcomes. To achieve its objective, a review of relevant literature was conducted providing the theoretical framework for this study. In addition, relevant laws, court cases, and other

official documents including reports were consulted and analyzed. Moreover, primary data was collected through intensive interview with various sections of the society, and these were closely analyzed in light of the theoretical discussions and the relevant laws.

Summary and Discussion of Research Findings

In dealing with the Ethiopian transitional process, this paper reviewed available literature on issues of transitional justice including the meaning and significance of transitional justice itself, and its main components - justice, truth, reparations and reconciliation. These provide the analytical framework for this study.

As discussed in chapter three, transitional justice is a concept that refers to various processes and mechanisms adopted by societies in transition to settle past violations. Although some may choose to forget the past, the predominant view is that societies emerging from conflict or repressive regime need to properly address their past in order to reconstruct a better future. Many states have employed various mechanisms of coming to terms with their past, including criminal prosecution, truth-telling and reconciliation processes, purges, lustration, and institutional reforms. The various experiences also indicate that transitional justice processes may take place at different levels.

In addressing past violations, societies are expected to make decisions on fundamental questions including the question whether to address or forget the past. Arguably, forgetting the past is one way of addressing the past, however passive, contested and undesirable it may be. If decisions are made to address the past, then a series of questions arise as to the mechanisms and processes of dealing with the past including its nature, scope and objectives/goals. In adopting any of the abovementioned mechanisms or a combination thereof, it is necessary to specify the objectives/goals to be achieved including justice, truth, reparation and reconciliation. There is no one formula applicable to all societies and hence each society has to identify its choices in formulating transitional justice processes and objectives.

However, certain critical points should be taken in to consideration for effective transitional processes. First, as issues of transitional justice affect the whole society, there should be the

widest possible public participation in decision-making processes. The absence of public participation compromises the legitimacy of transitional processes as well as what they can achieve. Secondly, in as far as, the concern is to address past violations, these past violations or crimes should be defined in an impartial and inclusive manner irrespective of whoever committed them. Societies striving to break from the past and establish a new system should lay their foundations in impartial processes, least it might compromise the process and thereby negatively impinge the future. Thirdly, transitional justice processes or their goals should be understood as complementary to one another. In other words, one should refrain from considering one mechanism or goal superior to, or even incompatible with, another mechanism or goal. Therefore, the debate should not be justice versus truth, justice versus reconciliation, or justice versus peace, which would lead to the debate over prosecution versus truth and reconciliation processes. These critical points are important elements of the evaluation of the Ethiopian transitional justice process.

A more useful approach to transitional justice is to view it as involving various complementary processes and objectives. This calls for a comprehensive or holistic approach in dealing with the past by adopting various complementary mechanisms to achieve complementary goals. This paper viewed justice, truth, reparation and reconciliation as essential and interrelated components of transitional justice processes, reflecting the principle of complementarity. For example, a broader understanding of justice may embody or promote all other components. On the other hand, justice, truth and reparation might lead to, or promote reconciliation, with the implication that reconciliation is the ultimate goal of transitional processes. Nevertheless, the meaning and mechanisms of achieving these various components are contested issues.

This study has shown that the conception and process of rendering justice is controversial especially in times of transition. Clearly, the notion of justice has been a subject of intellectual debate giving rise to the deontological and consequentialist (utilitarian) perspectives. Theoretical discussions also provide different forms of justice including distributive, restorative, retributive, interactional (interpersonal), and procedural justice. Some have conceptualized justice as deterrent, compensatory, rehabilitative, justice as an affirmation of human dignity and justice as exoneration. In view of these various conceptions of justice, the main issue is what conception and process of justice may be adopted during transition.

In the absence of objective conception of justice, this is basically dependent on the subjective conception of the decision makers. Although the decision-making process, during transition, is expected to be participatory, it might be the incoming regime that makes this decision. Hence, the conception of justice of the incoming regime or successor regime is most likely to dictate the policy choices and process of transitional justice. This may not be true in case of negotiated transitions where a negotiated justice results. It is also noted that the subjective normative conceptions of the decision makers may derive from reason, self-interest and emotions, which Jon Elster termed “tracheotomy motivations.” However, the relationship between subjective conceptions and actual behaviour, and which of the motivations among the hierarchy influence a certain course of action is difficult to establish. Nevertheless, the idea of motivations of justice might be useful to explain certain aspects of the Ethiopian transitional justice process.

A distinction was observed between various forms of justice including political justice, legal justice and administrative justice. In the context of transitional societies, political justice exists where the executive branch of the government unilaterally defines perpetrators and decides their fate, and this form of justice is attributed to authoritarian regimes. On the other hand, pure legal justice is attributed to judicial decision-making processes with well functioning judicial system complying with the requirements of impartiality, independence, competence and due process. However, in light of past violations and the culture of violence, we may question whether transitional societies can possibly have such systems in place. Although violation of certain requirements may be tantamount to pure political justice, some violations of these criteria are understandable and tolerable considering the peculiar situations of societies in transition. However, there is difficulty to demarcate ‘tolerable’ violations and those resulting in political justice, even though certainty or uncertainty of outcomes is taken as an essential indicator. Administrative justice refers to the purging or lustration of officials or members of the former regime or the army or security forces for committing violations. Administrative measures may be closer to political or legal justice depending on different factors including the existence or absence of procedural safeguards. These different forms of justice are useful to understand, explain and critically evaluate certain transitional justice processes. However, it is important to note that the distinctions between these different forms of justice are based on who makes the decision and on the existence or non-existence of

procedural safeguards. This political, legal and administrative justice perspective, again, is useful to understand the Ethiopian transitional justice process.

The existence of different conceptions or forms of justice implies that diverse mechanisms or a combination thereof may be adopted in dealing with past violation. Nevertheless, this study has focussed on one mechanism of doing justice, i.e. criminal prosecution, because it is the mechanism adopted by the Ethiopian transition. In this sense, justice is understood as the apprehension, investigation, prosecution, conviction and punishment of perpetrators according to the law. The significance of criminal prosecution and trial to transitional societies lies arguably in its contribution to the establishment and maintenance of rule of law, ensuring accountability and fighting impunity, the creation of a democratic society, its deterrence effect by exposing the truth and educating the public. In addition to forwarding these desirable goals of prosecution, proponents of criminal prosecution warn against the dangers of non-prosecution.

Prosecution is also seen as part of the obligation of states under international law. The duty to prosecute (or extradite perpetrators) exists under various international treaties and customary international law – especially under international humanitarian law and international human rights law. The treaty obligations emanate either from explicit provisions of treaties or authoritative interpretations of general obligations of states under treaties. In the context of international human rights law, prosecution is not only a matter of discharging state's duty, but is a component of victims' right to justice. A consideration of the duty to prosecute, however, gives rise to the question whether and to what extent this duty limits a society's choices in deciding its preferred mechanism(s) of dealing with the past. Although the application and desirability of amnesty is diminishing, a question arises whether a third way, i.e., truth and reconciliation, is desirable and allowed under international law.

There are strong arguments that support truth and reconciliation processes over criminal prosecutions. However, such arguments sustain the assumption of trade-off between different mechanisms and goals of transitional justice. A holistic approach to transitional justice can overcome the criticisms levied against any freestanding mechanism or objective or goal. Hence, one may view criminal prosecutions and trials as part of comprehensive mechanisms of dealing with the past. It is undesirable and unnecessary to deal with all perpetrators through criminal prosecution or other process alone.

Criminal prosecutions should, however, take note of the challenges that would render the process arbitrary, unfair or perceived as victor's justice. In other words, a decision to prosecute must take in to account the magnitude of violations and the huge number of perpetrators, the capacity of the judicial system as well as the requirements of impartiality, independence and due process, logistical issues (resource constraints), and impartiality in the definition of violations, perpetrators or victims. However, there is no formula of how prosecution processes should be conducted. Nevertheless, one needs to consider local contexts and institutional capacities as well as view prosecution as part of a holistic approach, whereby prosecution may also promote truth, reparation and reconciliation.

In transitional societies, although truth is a crucial component of transitional justice, it is a much-contested concept. Truth in these contexts is about what happened in the past or the circumstances surrounding past violations. The significance of the truth about the past to victims or their relatives or the society as a whole is enormous giving rise to the right to truth in international law. Although the emergence of the right to truth is subject to debate, the significance of establishing the truth about the past is generally accepted. Its significance lies in its contribution to the restoration and maintenance of peace, the promotion of criminal justice, facilitating reconciliation by healing rifts in societies, ensuring accountability and fighting impunity, reconstruction of national identities through dialogue and shared history, serving as a form of reparation, facilitating access to official documents. However, there are controversies on how to establish the truth, particularly whether criminal prosecution is capable of establishing the truth.

There is recognition of the significance of reparations to societies in transition, especially to victims of human rights violations or their families or relatives. In the context of transition, reparation is a claim against successor regimes (governments), as opposed to individual criminals, for violations committed by former regime. Reparation is a general concept that may take different forms - material, moral and symbolic reparations. Reparation is a form of justice for victims. It is an acknowledgement of the suffering of the past and an expression of commitment that similar violations would not be repeated again, and thereby contributes to the creation of a new political identity. It is clear from the discussion earlier that reparation is essential for reconciliation and the establishment of a democratic society. Hence, reparation can be seen as a rectification of past wrongs and a basis for building a new future. However,

reparation programs should be viewed as part of a comprehensive transitional justice process, and not a stand-alone remedy to past violations.

The theoretical discussion clearly shows that successor regimes have a general duty under international law to repair victims of past violations. However, in view of its significance, reparation can be considered as a moral duty even if no specific legal rules do exist. Nevertheless, its actual implementation involves a number of complicated issues including the determination of victims to be repaired, or violations in respect of which reparation is to be effected, resource constraints and the conflict between societies' forward-looking programs and the backward looking policy of reparations. In the context of massive violations committed over a period, it would seem difficult to determine the victims entitled to reparation programs. While not all reparation programs require mobilization of resources, compensatory policies require the allocation of resources. However, resources are limited in many developing transitional countries raising competition between state rebuilding and reparatory programs. However, resource limitation cannot be a justification for ignoring a state's legal or moral duty to repair victims of violation. Arguably, difficulty should not be equated with impossibility and hence, states should devise a mechanism of financing reparation programs either by allocating a certain percentage in their budget line or by establishing reparation funds.

Reconciliation is the ultimate objective of transitional justice processes of ending cycles of violence and violations. Although both the concept and mechanism of bringing about reconciliation are contested, transitional justice processes must be directed to the achievement of reconciliation as a lasting solution to societies emerging out of conflict or repressive regime. However, reconciliation requires justice, truth and reparation. Hence transitional societies need to devise appropriate mechanisms of achieving these multiple goals and thereby reconciliation.

In light of the discussion on the key aspects and components of transitional justice, this research therefore interrogates (1) whether the Ethiopian transitional justice framework was properly designed to deal with the past, and (2) whether or not it has achieved the stated objectives, and the implications of its success or failure to the present or future. Obviously, the transitional justice process might be expected to serve as deterrence as well as to contribute to the establishment of a system that upholds the rule of law, accountability,

human rights and democracy. In other words, one might expect this process to transform the Ethiopian social and political system. Nevertheless, various sources rate Ethiopia's political and institutional transformation very poorly. To provide few examples, the World Justice Project Rule of Law Index ranks Ethiopia at the "bottom half of the rankings among low income countries" in most aspects of rule of law.⁹²⁴ It clearly shows, among others, the absence of accountability, poor human rights performance, and weakness in the judiciary and justice process:

Accountability is very weak by regional standards [sub-Saharan Africa] (ranking eighty-eighth globally and third to last among low income nations)... The Performance of courts is very weak...The country has a very poor record in protecting fundamental rights, ranking ninety-second globally and second to last in the region...of greatest concern are restrictions limiting freedom of speech and assembly as well as illegal detentions and due process violations...⁹²⁵

This suggests the perpetuation of the culture of violence and violations of human rights by the government and impunity. The institutions of justice are weak and not functioning properly. Weakness in accountability implies not only impunity but also weakness in establishing a democratic system. One might argue that not all these would be occurring if the transition were successful. The state of democracy in Ethiopia is also rated very poor by different sources. The 2010 democracy index of the Economist Intelligence Unit ranks Ethiopia 118 and puts the regime under the category of authoritarian regimes, showing a retreat from the 2008 ranking as 105 and listing under the category of hybrid regimes.⁹²⁶ These rankings indicate that there is no transition to full democracy; neither did it attain the status of flawed democracy, which appears second in the democracy index. The Bertelsmann stiftung's Transformation Index (BTI) of 2012 ranks Ethiopia 105 of 128 in relation to political transformation.⁹²⁷ These sources might not be conclusive and their reliability might be questionable. Nevertheless, these assessments strengthen the views that seriously question

⁹²⁴ Agrast,M., Botero, J., Martinez, J., Ponce,A., & Prat,c., WJP Rule of Law Index, 2012-2013, Washington,D.C:The World Justice Project. The rule of law index is based on the following elements: (1) limited government powers, (2)absence of corruption, (3) order and security, (4) fundamental rights, (5) open Government, (6) regulatory enforcement, (7)civil justice, and (8)criminal justice.

⁹²⁵ Agrast, (Ibid)

⁹²⁶ Democracy Index 2010, Democracy in Retreat, A report from the Economist Intelligence Unit, The Economist,www.eiu.com. This regression may be attributed to the measures taken by the government following the 2007 election.

⁹²⁷ Bertelsmann Stiftung,BTI 2012 – Ethiopia Country Report. Gutersloh: Bertelsmann Stiftung,2012

whether the Ethiopian transitional justice process has played a successful transformative role by establishing a democratic system. Indeed, electoral experiences in Ethiopia demonstrate the absence of dialogue, negotiation and compromise among the different political leaders, and thus perpetuating the culture of confrontations and violence.⁹²⁸ These political and ethnic polarizations, again, reflect the inadequacy of the transformative role of the Ethiopian transitional justice process and interrogate whether there has been significant political transition within the country.

This author now turns to the specific findings that emerged from this study and the implications thereof.

1. Ethiopia choose to deal with its past through criminal prosecution as incorporated in the proclamation establishing the Office of Special Prosecutor referred to as SPO, which was mandated to investigate and institute proceedings against members of the Dergue and its affiliates who committed crimes.

As already discussed violence and violations were committed in Ethiopia during the seventeen years of the Dergue regime, and as recognized in proclamation establishing the SPO, violations were committed by successive imperial regimes over centuries. In the context of Ethiopia, the arguments in support of prosecution resonate with the general theoretical arguments in the sense that it is necessary to ensure justice, rule of law and accountability, to educate the public and deter the occurrence of similar violations, and to promote democracy. Prosecution is also seen as a discharge of Ethiopia's duty under international law to prosecute grave violations of international human rights law and international humanitarian law. Prosecution advances justice however contested the conception of criminal justice might be. Moreover, as enshrined in the SPO proclamation, prosecution and trial processes are meant to discover and establish the truth. The Ethiopian transitional justice framework can be appreciated for incorporating justice and truth as its objective.

⁹²⁸ Lahra Smith, Political Violence and Democratic Uncertainty in Ethiopia, Special Report, United States Institute of Peace, Washington D.C, August 2007.[Accessed on 30 February 2014]. Available from the World Wide Web: <http://www.usip.org/sites/default/files/sr192.pdf>. Moreover, Lahra Smith observed that deep-rooted ethnic, linguistic and religious divisions also surfaced giving rise to critical tensions

2. The Ethiopian transitional justice framework emphasizes the punishment of perpetrators, and neglects some essential elements of transition, namely reparation and reconciliation

It is true that criminal prosecutions and trials might satisfy victims' need for retributive justice. It has been shown that victims were demanding the prosecution of perpetrators. However, reparation is also an essential component of justice for victims of violations. Reparation – particularly material reparation – gives the most direct benefit to victims of crimes. Nevertheless, the Ethiopian transitional justice framework did not incorporate adequate policy for reparation.⁹²⁹ It would appear from the findings that although victims needed material reparation, they were not organized to claim for reparations at the time of the transition. Nevertheless, there were individual instances where such a demand was made, however limited the demand might have been. The point is that there was a need for reparation but it was unclear to victims from whom to demand it. One issue that arises, however, is whether the Ethiopian government could possibly have adopted a policy of reparation given the magnitude of the crimes committed and the resources of the country. This of course speaks to the difficulty and not the impossibility of having such a policy. Hence, one may see the failure to adopt a general policy for reparation as a weakness of the Ethiopian transitional justice process.

The data indicates that there was a need for reconciliation. The Ethiopian society has been affected by ethnic and political divide, and a culture of political violence. Again, the emphasis on punishment of perpetrators diminished the importance of addressing the long-accumulated divide and polarization within the country. In light of the history of ethnic and political polarization, some process of reconciliation would have been an essential component of the transitional justice process. The argument against reconciliation processes is that the transition was enabled by victory of one group over the other, and there was no existing condition for the need for truth telling and reconciliation processes. In other words, the rejection of truth and reconciliation processes primarily relate to the absence of the conditions for truth and reconciliation

⁹²⁹ Although no general policy of reparation was devised, we have noted that certain restitution measures taken by the government, although limited, can be considered as a form of reparation. In addition, the government was taking certain measures that may be considered as moral or symbolic reparation. Clearly, there was no evidence that the victims were organized and laid their demand for reparation at the time of the transition.

in the sense that the former regime was totally defeated, posed no threat to the future, and had no bargaining power. Is reconciliation necessary only when a former regime is still strong or poses threat? Yes victory, rather than negotiation, creates better conditions for prosecution, and prosecution is not only desirable but is a matter of duty to some extent. However, the fundamental issue is can prosecution alone solve deep-rooted problems in the Ethiopian society, especially considering the identified limitations of prosecution.⁹³⁰ The significance of reconciliation in ending cycles of violence transcends the issue of victory or defeat at any particular time. Reconciliation is essential for reconstructing better social and political relations by addressing long entrenched divisions and animosity. Considering the significance of reconciliation to Ethiopian society, it is unfortunate that no process of reconciliation was adopted as a matter policy or advanced in practice.

Thus, it can be concluded that the Ethiopian transitional justice framework failed to incorporate adequate reparation policy while it entirely excluded reconciliation as essential components of transitional justice. It adopted prosecution as the only mechanism of dealing with the past with justice and truth as the main objectives. Hence, it lacks the comprehensiveness in the formulation of its objectives, which in turn, we see, affected its outcome.

3. The Ethiopian transitional justice framework resulted from the incoming government's decision with little or no public discussion. An understanding of the prevailing of transitional justice indicate that, as questions of transitional justice are public issues, public participation in designing the framework is crucial for successful transition. The transitional society should deliberate on and decide how to address its violent past. In societies emerging from repressive regimes like Ethiopia, where people's voices were silenced, the significance of public participation cannot be understated. It not only sends the message that the new system is inclusive but also enables the best possible choice to be made. In this respect, the Ethiopian transitional justice framework was formulated by the transitional government with limited⁹³¹ or

⁹³⁰ One should note that even respondents who supported prosecution admitted the limitations in the process in the sense that it was difficult or even impossible to go after each crime and each perpetrator, and it clear that in light of the extent of violations committed, prosecution could not cover all perpetrators.

⁹³¹ There are indications of consultation with or demand by victims however limited or contested it may be.

no public participation⁹³² on the issue of how to deal with the past. The transitional government and its legislative organ, the Council of Representatives, were mainly composed of representatives of political parties, with EPRDF holding the majority of seats. There were no elections, and no public representation. Hence, apart from the limited consultation with victims, there was a lack of public participation in the formulation of the framework.⁹³³ The Ethiopian public did not deliberate on the available choices to make a decision. This among other issues raises the question of legitimacy and public ownership of the process, its operation and its results.⁹³⁴ By contrast, there was suspicion that the international community, particularly human rights organizations and western government, influenced the formulation of the framework, which might give rise to the question: to what extents can the international community dictate transitional justice frameworks.

At any rate, it can be inferred from the SPO proclamation and the available data that the framework was the result of government decision partly informed by victims needs though limited. The public, the main stakeholders, was not involved in the decision making process regarding how to deal with the past. This has consequences on the appropriateness of the choice made, its operation, results and even its legitimacy. Our data shows different alternatives were available to Ethiopia. However, the public did not deliberate on them, and the process was not participatory.

4. The Ethiopian transitional justice framework lacks broadness in defining violations, perpetrators, and victims. In other words, the narration of the history of violation is partial. The SPO establishment proclamation clearly states that it was the Dergue that committed past violations, and that investigation and prosecution is exclusively directed against them. However, the question is whether such a formulation of crime and perpetrators is appropriate – a question of scope of definition. The assertion that the Dergue committed serious and gross violations, and thus deserves punishment may not be disputed in light of the available data. The question however is whether the Dergue was the only violator. Clearly, other political groups had also committed

⁹³² As observed in chapter 5, some people are of the opinion that the EPRDF government exclusively adopted the prosecution framework without any public participation.

⁹³³ Of course, the whole transitional process of establishing the Charter and the TGE was subject to criticism for lack of widest possible participation by political groups let alone, the general public.

⁹³⁴ Even some victims felt it was up to the government and they did not believe in the process

crimes in the past.⁹³⁵ Why were they excluded from the framework? This might have resulted from the assumption that their participation in violations was very limited and cannot be equated with that of the Dergue.

Our understanding of transitional justice informs us that the efforts to address past violations should address all perpetrators irrespective of their political affiliation. The history of violence should be formulated in an impartial manner and broad enough to deal with perpetrators without consideration of their background. After all, a crime is a crime, as one respondent already argued. These other political groups might have not used the state machinery. Nevertheless, they are believed to have committed crimes whatever their degree or whatever the corresponding punishment might be. How can one know that the participation of these groups or their crimes was limited without conducting proper investigation? Addressing the past requires a broader understanding of past violations and subjecting perpetrators to the same process of accountability. A new system should begin with an impartial understanding of the past and set new standards whereby everyone is treated in the same manner. Therefore, the formulation of violations and perpetrators in the Ethiopian transitional framework is problematic. It did not address violations by other political groups. Even the argument that they were limited does not justify their exclusion, as we do not know the extent of these violations. Nevertheless, the argument here is not that they should have been brought to court like the Dergue; it is rather that they should have been held accountable. As discussed in chapter four, accountability does not necessarily imply prosecution and punishment of all perpetrators. Clearly, there was no other process of dealing with other political groups in Ethiopia. Thus, the narrowness of the framework has repercussions on the search for justice, truth, and the future of the society.

5. The Ethiopian transitional justice process set a retributive conception of justice as its primary objective. Some viewed it as appropriate arguing that justice pertains to the punishment of perpetrators in accordance with the law. The investigation, prosecution, conviction, and punishment of perpetrators was thought to be essential

⁹³⁵ This is clear from the discussions in chapter two that alternative narrations of history of violations exist in various historical documents. The primary data collected and presented in chapters 5 and 6 also support the view, although some of them have questioned the degree of involvement in violations, and the desirability of prosecuting them.

not only in rendering justice but also in promoting other desirable goals including deterrence and building rule of law. On the other hand, the retributive conception of justice was criticized; and thus led to the rejection of the process as not motivated by the desire to see justice done. The process was questioned for its emphasis on revenge and vindictiveness. Hence, the conception of justice and the modality adopted to achieve it is dismissed as not proper way of dealing with the past. Arguably, truth and reconciliation processes are more compatible with traditional understandings of justice in the sense that what is more important is the appearance of the perpetrator before victims or their families, the acknowledgement of wrongs and asking for forgiveness. The point is that conviction and punishment alone are not significant; truth and reconciliation process would have better satisfied victims or relatives and hence promoted social harmony. However contested the concept of justice is, this study has also inquired whether the Ethiopian process has achieved justice – an inquiry as to the outcome of the process although this outcome also depends on the framework itself.

6. Like its conception, the realization of justice is questionable. Even proponents of the process recognize certain limitations that have compromised the realization of justice. The main limitation relates to the delay of the proceedings. It hindered the gathering and production of evidence resulting in some perpetrators going free. In addition, the public, including victims or their families, lost interest to attend the proceedings, which resulted in dissatisfaction with the process as well as the result. Moreover, the delay has also implication on the right to a speedy trial because justice delayed might be justice denied. The other limitation relates to the issue of proportionality of punishment. It was observed that some perpetrators did not receive adequate punishment; this view underlines that punishment be proportional to the crime committed.⁹³⁶ In addition, it is clear that some perpetrators lived abroad, and the government failed to bring them to justice. Furthermore, the government has failed to carry out punishment with respect to those convicted in absentia. The point here is that justice requires not only the pronouncement of judgement but also its execution. Moreover, it was observed that even among Dergue members, the process had not gone after each crime or perpetrator. Whether that is possible or desirable is another

⁹³⁶ The reasons for lack of proportionality are discussed in chapter 5.

question that begs whether wholesale prosecution was appropriate or whether we could have opted for a different alternative. Apparently, these limitations suggest that the realization of justice was incomplete although they were raised in relation to the crimes committed by the Dergue or its affiliates.

The more fundamental problem of realization of justice is associated with the absence of trust in the entire political and justice system. The perception is that the transitional justice was not motivated by the desire for justice. The government is criticized for having no commitment to justice, and worse it is blamed for undermining the institutions of justice; hence, neither justice nor other desirable goals were achieved. The other critical problem, as indicated above, is the partiality of the process raising the question whether justice can be partial. The exclusion of other political groups had exonerated some perpetrators and to that extent, compromised justice. Justice must be impartial. All violators, and victims for that matter, shall be treated equally. However, this does not mean they shall be subject to the same punishment. If justice is punishment according to the law, then would it be appropriate to select and prosecute one group alone. What lesson does such selectiveness give to the society? Is it victor's justice? Hence, one constraint to justice is the legal framework establishing the SPO. Hence, one notes that justice in the Ethiopian transition is very problematic.

7. The Ethiopian transitional justice framework is premised on the quest for a certain conception of truth as its objective. The SPO proclamation provides that the history of past violations shall be recorded for posterity, and that this will advance public knowledge about the past, and deters the commission of similar violations. History recording is part of the prosecution and judicial process of dealing with past violations. However, the proclamation also stated what violations are subject to prosecution, and thus the proclamation in itself provided a particular narrative of the truth. The truth is that the Dergue committed gross violations against the people of Ethiopia. If this is the truth, then what else is there to be established? Presumably, simply the details of this general truth.

There is no doubt that the truth about the past is essential element of reconstruction of a society or the state. History must be established and known to guide our future

action and determine our relation. The Ethiopian transitional process had foreseen the importance of doing that. However, did it accomplish that effectively?

It might be argued that the prosecution and judicial process had, to some extent, contributed to the discovery of the truth. The actual judicial process had reaffirmed the formal and political truth reflected in the SPO establishment proclamation, that the Dergue used the state machinery to kill and exterminate what it thought enemies or their supporters. Nevertheless, this conception of a limited truth in the Ethiopian transitional process of accountability is problematic for different reasons.

It is important to note that truth and history, as part of the Ethiopian transitional process, are seriously contested matters. Ethiopian history in general and the history of violations is subject to different narrations and interpretations. In light of these variations, the transitional process might be expected to come up with an impartial and complete narration constituting a shared understanding of history of violations, perpetrators and victims. However, the transitional process, it would appear, further compounded the controversies rather than resolve them.

The search for, and recording of, truth was premised on a political definition of truth. The prosecution and judicial processes are constrained by a political decision as to what constitutes the truth. This limited the scope of the truth to be determined in the Ethiopian transition. Hence, the process is not broad or comprehensive enough to uncover past violations. As shown in the analytical framework, the search for truth is a difficult task, and no process had established the whole truth. The context of transition that came close to establish the whole truth is the South African Truth and Reconciliation Commission. The difficulty or even impossibility of establishing the whole truth is understandable. Nevertheless, the efforts to establish or record past violations should be undertaken irrespective of who committed the violations. From this perspective, the Ethiopian transitional process can be characterized as partial or one-sided for its exclusion of violations committed by other political groups. Hence, one may question whether the whole process was motivated by the search for truth and the establishment of a better society or by other desires. In addition, such partial truth is inadequate to either remedy the past or serve as a foundation for a new social and political system. This contests whether there is an effective transition.

A further question can be raised as to the suitability of courts to search for and record the truth. The Ethiopian transition exemplifies the problems of judicial truth discussed in the analytical framework. Judicial process coupled with its stringent procedural requirements and the motive to punish is not suited to the search for truth. There is often a lack of evidence to establish the truth with the implication that some perpetrators were going free and the fate of some victims remaining unknown. Hence, the judicial process faced practical limitations even in relation to violations committed by the Dergue. The Ethiopian transition is more problematic in light of people's perception about the government's lack of commitment to truth or justice and lack of institutional impartiality and independence. The search for truth must be undertaken with full impartiality and independence, which the Ethiopian institutions of justice are understood to be lacking. In light of all these problems, one could say that, although the Ethiopian transition had to some extent established the truth, it is affected by series of flaws. A further inadequacy of the process is the lack of publication of the truth and public access to official documents, evidencing past violations. Despite extensive prosecution and trial processes, efforts to bring the outcomes to the public are very limited or non-existent. Moreover, official documents are placed beyond the reach of the public. Even if one claims the truth was established, it has little or no significance unless the public or victims become aware of it. After all, it is the knowledge of the truth of the past that reconstructs individual and collective behaviour, and helps in building a better future. If the truth remains unknown, it is problematic to properly address the past and create a better socio-political identity. This again questions whether there is any meaningful transition in Ethiopia.

It can be argued generally that, although the Ethiopian transitional process had partly established the truth, it failed to give a complete picture of the truth about past violations. The transition totally ignored a significant part of the history of violations. This problem is related to the framework itself, which was formulated by the government with little or no public participation. The implication is that the truth is what the government says is the truth. As long as the government is not interested in other truths, they do not matter. Hence, the transitional process itself and efforts of state reconstruction were based on the "official" or "political" truth. However, as long as part of the truth is not recognized, it is impossible to say that the Ethiopian

transition is based on participation, inclusiveness and equality in dignity and accountability –rights and duties. The silenced histories/voices still question and delegitimize the whole process of Ethiopian transition.

8. The Ethiopian transitional justice process has not fully contributed to the rule of law and deterrence, respect for human rights, building democracy and promotion of reconciliation. These outcomes, to some extent, depend on the degree of success of the process in rendering justice and truth. The prosecution and judicial process has sent the message that no one escapes from accountability for violations. This might be seen as the contribution of the process to rule of law, deterrence, and the respect for human rights. In addition, accountability and rule of law are essential attributes in building a democratic society. Nevertheless, all the problems witnessed in the process do limit these positive outcomes.

The success of the Ethiopian transition is diluted with the continued existence of similar violations under the current regime and the lack of accountability for the same. A transitional process of justice is meant to address past violations and set a new beginning where similar violations will not occur. Its successes and contributions can only be seen in the broader legal and political context. The existence of similar violations would negatively affect the outcomes of the process or at least the perception of people. The continuation of the past, even if it is of lesser degree, would rather make the entire process questionable in terms of legitimacy, achieving its objectives, and its overall contribution including deterrence, rule of law and respect for human rights etc.

A related problem is the failure of the entire justice system. The integrity, impartiality, reliability of the justice system is essential component of a transitional process. A transitional justice process is also expected to reflect the commitment to rule of law by strengthening institutions of justice. If the justice system lacks or perceived as lacking such attributes, the entire transitional process would be questioned in terms of a genuine commitment to uphold rule of law, human rights and democracy, and sending the message against impunity. The Ethiopian justice system is widely criticized for lack of independence and impartiality. This problem raises the issue

whether one can obtain justice for violations committed under the current government, and hence leads to lack of confidence and trust in the justice system.

Finally, reconciliation is the ultimate objective of transitional justice process because through disclosure, acknowledgment and forgiveness it ensures social harmony and provides a shared commitment not to repeat the past. It ends cycles of violations. Ethiopian society endured long history of political and ethnic division and intolerance, and hence there was/is a need for reconciliation. However, the Ethiopian transitional framework never incorporated this as its objective, and one would not see it at the end of the process either. Hence, political polarization and the culture of intolerance persist in Ethiopia.

Concluding Remarks

To conclude, the Ethiopian transitional justice process might be seen as a paradigm shift in light of the countries long and deep-rooted experiences of cycles of violence, and hence it can be viewed as making some positive contributions in terms of justice, truth and other desirable goals. Nevertheless, the above limitations and shortcomings clearly suggest that it has failed to transform the Ethiopian society into a full-fledged rights respecting and democratic system. People still believe justice was not done and the truth remains to be uncovered. Moreover, the incoming government is committing similar violations with impunity. Furthermore, the transitional justice process has failed to create strong, impartial and independent institutions of justice. Above all, the absence of reconciliation has sustained ethnic and political division, political polarization and the culture of intolerance. This all indicate Ethiopian society have not successfully settled their past. A successful transition is thus a standing issue.

Way Forward

This research has shown the challenges of transitional criminal justice process in serving as a foundation for a new political and social identity that morally departs from a repressive past. This author recommends further research, equipped with more resources, and debate regarding the various aspects of the Ethiopian transitional justice process.

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ANNEXES

ANNEX 1 – Guideline for Interview

Guideline for Interview for the research project National prosecution and Transitional Justice: The Ethiopian Case

Name of the Researcher: Demelash Shiferaw Reta

About the research Project

I am currently working my PhD research project on Transitional Justice Process in Ethiopia. As well known, Ethiopia and its peoples had endured consecutive regimes/periods of human rights violations. But it lacked systematic and appropriate mechanisms of dealing with past atrocities until relatively recent time when the TGE had initiated a historic mechanism-the settlement of past atrocities through criminal prosecution. My research project is to assess whether the criminal prosecution has addressed issues of transitional justice (Justice, truth, compensation, and reconciliation) in Ethiopian context. Your views/opinions about the framework, its operation and consequences are an essential input in achieving the objective of the research project. Hence, I politely request your cooperation to reflect your opinion on the following issues.

Policy

Your identity will remain anonymous unless you authorize the researcher to reveal it.

Interview questions

1. What is your understanding of the history of violence and human rights violations in Ethiopia during the Dergue regime?
 - 1.1. How do you describe the degree of violation?
 - 1.2. Who do you think were victims of violations?
 - 1.3. Who is to be blamed for violations? The Derg? EPRP? other political groups?
 - 1.4. Do you think it was/is necessary to address these violations?

2. After the fall of the military regime, the transitional justice process adopted in Ethiopia was criminal prosecution against former leaders and their affiliates. How do you evaluate the Ethiopian framework /transitional mechanism of dealing with the past?
 - 2.1 Did the people participate in its design? Or was it designed by the government with out participation?
 - 2.2 Was the framework properly designed to address all violations/perpetrators? or did it address only the Derg? do you think such was right?
 - 2.3 Were its objectives framed in a satisfactory way/were there missing elements? (in terms of justice, reparation, truth and reconciliation)
3. What factor(s) do you think led to the adoption of criminal prosecution? were other options possible at the time?
4. How do you evaluate its general performance in terms of its objectives?
5. Do you think the criminal prosecution has succeeded in rendering justice to victims, families/relatives, and the society as a whole?
 - 3.1. How can we explain the justice, if any? Did it satisfy all victims/families and relatives?
 - 3.2. Do you think the process was transparent, fair, impartial and independent?
 - 3.3. Do you think the process has succeeded in punishing all those involved in past violations?
 - 3.3. What is your opinion about the current release of those found guilty? [legal &political implications]
6. Do you think it has helped victims & families to know what happened in the past?
7. Do you think it has resulted in the discovery of the truth about the past/can we say that an impartial, full and incontestable historical account of the country has been established through the process?
8. Do you think that the process has satisfactorily compensated victims? Do you think victim reparation was/is necessary? If so who has to repair? What form should reparation take-moral, material or symbolic, or any combination of these?
9. How do you evaluate the process in terms of facilitating reconciliation? Do you think reconciliation is necessary in Ethiopia? If so, who is to reconcile with whom?
10. Do you think the process has ensured that similar human rights violations/abuses will not happen again? How do you evaluate its deterrence effect?

11. How do you evaluate the contribution of the process to the establishment of a democratic and rights respecting system?
12. What other alternative(s) could have been adopted in Ethiopia, if any? Do you think some measure should be taken to complement the achievements of the prosecution process? If so, what measures/mechanisms would you recommend.